FILED
AUG 20 1991
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91-334

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

ZLATKO GVOZDENOVIC; MARGARITA WALINSKI; PATRICIA CARGOULD; FRANK PEREA, Individually And On Behalf Of That Class Of 1202 Former Pan Am Flight Attendants Now Employed By United Airlines, Inc., And As Members Of The Pan Am Seniority Arbitration Committee,

Petitioners,

VS.

UNITED AIR LINES, INC.; THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, And Its President, SUSAN BIANCHI-SAND; AU RODNEY; PAMELA GREENLEAF, As Members Of The United Airlines Seniority Arbitration Committee; PATRICIA FRIEND, Chairperson Of The United Airlines Master Executive Council; And THE UNITED PREACQUISITION FLIGHT ATTENDANTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the union security provisions of Railway Labor Act (RLA) Section 152 Eleventh (a) may be contractually restricted?

2. Whether the denial of the 60-day grace period under RLA Section 152 Eleventh (a) is subject to the six month limitation period or is a continuing violation for the period of its enforcement in the case of patent illegality?

3. Whether a carrier's grant of illegal financial assistance under RLA Section 152 Fourth is subject to the six month limitation period or is a continuing violation for the period of assistance in the case of patent illegality?

4. Whether the illegal imposition and collection of dues under RLA Section 152 Eleventh (a) are subject to the six month statue of limitations or are continuing violations for the period of collection in the case of patent illegality?

5. Whether violations of the duty of fair representation (DFR) in the making, enforcement and conduct of an arbitration are subject to the six month limitations period commencing with the entry of the arbitration award or prior thereto?

6. Whether an arbitration award under the RLA should be vacated where the primarily affected parties were not parties to the underlying arbitration agreement?

LIST OF PARTIES

The names of all parties to the proceeding in the Second Circuit are listed in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Zlatko Gvozdenovic, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Unites States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on May 22, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 933 F2d 1100 (2nd Cir. N.Y. 1991), and is reprinted in the appendix hereto, (Appendix A-1). The Opinion of the United States District Court for the Southern District of New York (Griesa, D.J.) (Appendix B-1), and its bench remarks (Appendix C-1) issued in conjunction with said Opinion, have not been officially reported; but, the Opinion is unofficially reported at 118 Labor Cases (CCH) ¶ 10,542 (D.C. N.Y. 1990).

JURISDICTION

Invoking jurisdiction pursuant to the provisions of the Federal Arbitration Act, 9 USC §§ 10, 11, the RLA, 45 USC §§ 151, *et seq.*, and the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC § 411, 412, on December 28, 1987, the petitioners filed their initial action in the Southern District of New York alleging a course of conduct by respondents United Airlines, Inc. (United) and the Association of Flight Attendants (AFA), and certain of its officers and members, which violated petitioners' legal entitlements under the foregoing statues and required the setting aside of a certain arbitration award dated September 26, 1987.

On March 30, 1990, upon hearing of the parties cross motions for summary judgment, the District Court dismissed petitioners' claims by its bench remarks of that date, as supplemented by its Opinion filed August 17, 1990.

On petitioners' appeal to the Second Circuit, the Court of Appeals affirmed the District Court's decision on May 22, 1991. No petition for rehearing was sought. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. RLA Section 152 Fourth and Eleventh (a) and (b):

§ 152. General Duties

. . . .

Fourth. Assistance in organizing or maintaining organization by carrier forbidden

. . . .

[I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining,

. . . .

Eleventh. Union security agreements; check-off. . . .

[Any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member. . . .

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penal-

ties) uniformly required as a condition of acquiring or retaining membership: . . . .

2. LMRDA Section 411(a)(3)

411. Bill of rights; constitution and bylaws of labor organizations

. . . .

(3) Dues, initiation fees, and assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except

. . . .

(B) in the case of a labor organization, . . . (i) by majority vote of the delegates voting at a regular convention, . . ., or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: . . . .

STATEMENT OF THE CASE

The history of this case as set forth under the "Background" section of the Court of Appeals' decision (A: 3-6) is incorporated by reference. For the purposes of this petition, there is no dispute over the Court of Appeals' determination of the factual background of this case.

Notwithstanding, the petitioners take issue with the Court of Appeals' findings with respect to the running of the various limitations periods on petitioners' duty of fair representation and RLA claims and, most importantly, the Court of Appeals interpretation and application of the RLA's union security clause to newly hired employees.

With respect to petitioners' DFR claims of discriminatory treatment by AFA in the making and enforcement of the seniority arbitration agreement, the Court of Appeals found that such claim began to run for purposes of the six month limitation period of *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 169-71 (1983), with AFA's ratification of the arbitration agreement on March 14, 1986, thus expiring prior to the filing of the action on December 28, 1987. (A: 8-9).

The Court of Appeals similarly found that petitioners' claims respecting the imposition and collection of AFA dues during the first sixty days of their employment, to the extent that this was asserted as a violation of RLA section 152 Eleventh (a) and (b), was also time barred under the six month limitations period which the Court of Appeals found ran from the date of petitioners' hiring and/or the ratification of the arbitration agreement imposing such dues. (A: 10-11). The same result was reached in the Court of Appeals' treatment of petitioners unlawful assistance claims under RLA section 152 Fourth. *Ibid.*

In each of these instances of dues and assistance violations, the Court of Appeals rejected any argument that they qualified as "continuing violations," since the continuing activities, while so found, did not flow from "an agreement invalid on its face or with one validly executed, but unlawfully administered," citing *Local Lodge No. 1424, I.A.M. v. NLRB,* 362 U.S. 411, 423 (1960). (A: 11).

On the issue of the viability of the arbitration agreement, while admittedly made before petitioners were hired by United, the Court of Appeals confirmed the District Court's finding that the subsequent participation of the petitioners' class in the arbitration constituted sufficient consent; and that, in any event, the arbitration agreement constituted a third-party agreement to which they were bound. (A: 7-8).

Finally with respect to petitioners' LMRDA claims that the imposition of dues to the petitioners' class during the first sixty days of their employment also violated their rights under the dues adoption by majority vote under LMRDA Section 411(a)(3), the Court of Appeals concluded that United and AFA were contrac-

tually free to redefine the former Pan AM flight attendants as other than "newly employed flight attendants," thereby exempting from the provisions of RLA Section 152 Eleventh (a) and (b) and the provisions of the collective bargaining agreement's union security clause (A: 12). The Court of Appeals' opinion authorizes the contractual deletion of the 60-day grace period afforded employees under the RLA in which to join or not to join a union. The Court of Appeals' decision effectively allows the imposition by contract of a closed shop conditioning the hiring of new employees on their acceptance of union membership.

As will be demonstrated in the following arguments, the Court of Appeals' disposition of these issues is contrary to controlling law and the decisions of this Court and the Circuit Courts.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' DECISION PRESENTS A CRITICAL ISSUE OF FIRST IMPRESSION FOR THE INTERPRETATION AND APPLICATION OF THE UNION SECURITY PROVISIONS OF RLA SECTION ELEVENTH (a) AND (b)

The most grievous error of the Court of Appeals' decision lies in its emasculation of the provisions of RLA Section 152 Eleventh (a) and (b) whereby the Court of Appeals held that United and AFA were contractually free to redefine the status of the 1202 former Pan Am Flight Attendants in a status other than "newly employed flight attendants." Pg. 7, *Ibid.* In effect, therefore, the Court of Appeals' decision allows the imposition by contract of a closed shop requiring union membership as a condition of hiring.

As a matter of clear statutory mandate, the union security provisions of RLA Section 152 Eleventh (a) and (b) apply to the first "sixty days following the *beginning of . . . employment . . .*" 45 USC § 152 Eleventh (a). As found by the District Court and the Court of Appeals, the "beginning of . . . employment" of the 1202 Former Pan Am Flight Attendants was as of February 11,

1986; prior to that time they were employees of Pan Am and members of another labor organization. (A: 3-4).

If the Court of Appeals' decision is allowed to stand, parties subject to the RLA could contractually redefine and/or eradicate a "beginning" date of employment so as to strip newly hired employees from the protections of the union security provisions of RLA Section 152 Eleventh (a) and (b) and effectively require mandatory union membership as a condition of hire. Such an abrogation by private parties of a statutory protection cannot be countenanced. See: *Alexander v. Gardner-Denver,* 415 U.S. 987, 1974).[1]

For this reason, petitioners respectfully submit that good cause exists for the granting of this petition on the ground that the Court of Appeals' decision presents a critical issue of first impression for the interpretation and application of the union security provisions of RLA Section 152 Eleventh (a) and (b). *United States v. Gainey,* 380 U.S. 63, 65 (1965); *American Federation of Musicians v. Wittstein,* 379 U.S. 171, 175 (1964); *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955); *United States v. Ruzicka,* 329 U.S. 287, (1946).

II

THE COURT OF APPEALS' DECISION INTERPRETING RLA SECTION ELEVENTH (a) AND (b) CONFLICTS WITH THE DECISIONS OF THIS COURT

In this Court's latest decision respecting union security clauses under the Railway Labor Act and the National Labor Relations Act, it was found in *Beck v. Communications Workers of*

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[1] The Court of Appeals' confusion regarding the jurisdictional parameters of the RLA is also evident in its finding that "[a]s the exclusive bargaining representative of United flight attendants, the AFA has a duty under section 8(b) of the National Labor Relations Act, 29 USC § 158(b), to represent all of those employees, including the Pan Am transferees . . ." (A: 19-20). No citation is necessary for the basic proposition that AFA in its representation of United flight attendants is subject solely to the RLA.

America, 487 U.S. 735, 743 (1988), that "[t]he necessity of deciding the scope of § 8(a)(3) (union security clause) arises because petitioners seeks to defend themselves on the ground that the statute authorizes precisely this type of conduct."

A similar statement could be made herein because the Court of Appeals confirmed the exclusion of the former Pan Am Flight Attendants from the protection of the union security provisions of the RLA on the ground that the "statute authorized" the parties to define new employees so as to exclude petitioners from the protection of Section 152 Eleventh and its 60-day grace period. Under the Court of Appeals' approach, United and AFA were well within their rights to contractually require the former Pan Am Flight Attendants to join the AFA as a condition of their hiring at United. This requirement flies in the face of the statutory intendments underlying the union security provisions under both the NLRA and the RLA under which "a man can get a job without joining the union." *Beck v. Communications Workers of America, supra. at 760. See also: Machinists v. Street,* 367 U.S. 740 (1960); *Pennsylvania R. Co. v. Rychlik,* 352 U.S. 480, 494-496 (1957); also: *NLRB v. Campbell Soup,* 378 F.2d 259, 261 (9th Cir. Cal. 1967) (Deducting of dues without affording affected employees the benefits of the 30-day grace period under the NLRA ruled illegal].

Such an approach also places itself in direct conflict with this Court's decision in *Felter v. Southern Pacific Transportation Co.,* 359 U.S. 326, 336 (1958), wherein this Court found under similar circumstances that RLA section 152 Eleventh "makes it clear that the organization was not to function as its members' agent in waiving their statutory rights." Yet, such is the result allowed by the Court of Appeals' decision.

For this reason, petitioners submit that good cause exists for the granting of this petition on the ground that the Court of Appeals' decision conflicts with the decisions of this Court. *Wilkinson v. United States,* 365 U.S. 399, 401 (1960); *Braen v. Pfeifer Transportation Co.,* 361 U.S. 129, 130 (1959); *Upshaw v. United States,* 335 U.S. 410 (1948).

III

THE COURT OF APPEALS' DECISION RESPECTING APPLICABLE LIMITATIONS PERIODS FOR THE VIOLATIONS OF RLA SECTIONS FOURTH AND ELEVENTH (a) AND (b) CONFLICTS WITH THE DECISIONS WITHIN THE SECOND AND OTHER CIRCUITS AND THIS COURT

The Court of Appeals premises its findings against continuing violations of RLA Sections Fourth and Eleventh (a) and (b) upon its determination that the violations did not "flow from an agreement invalid on its face," citing *Local Lodge 1424, I.A.M. v. NLRB, supra.* But, to the extent that the agreement denied the petitioners their 60-day grace period vouchsafed under RLA Section 152 Eleventh (a) and (b), the agreement was indeed "invalid on its face." By the same token, to the extent that United contracted to finance AFA's arbitration proceedings, that contractual commitment was also patently "invalid on its face" as in contravention to the proscriptions of RLA Section 152 Fourth.

The case before us is clearly distinguishable from the facts of *Local Lodge 1424* where on the face of the agreement there existed a valid union security clause which provided for a "45 day grace period to become and remain members of the union." *Local Lodge 1424, I.A.M. v. NLRB, supra.* at 412. Hence, the decisions of and the Second and other Circuits have found violations of union security clause provisions to be continuing violations until terminated. *NLRB v. Campbell Soup Co., supra.; NLRB v. Sightseeing Guides and Lecturers Union, Local 2006 of Greater New York, AFL-CIO,* 310 F.2d 40, 41 (2nd Cir. N.Y. 1962) [mere retention of illegal clause actionable]; NLRB v. Gottfried Baking Co., 210 F.2d 772, 779-780 (2nd Cir. N.Y. 1954); *Ellis v. Western Airlines,* 652 F.Supp. 938, 939 (S.D. Cal. 1986) [illegal dues checkoff under RLA for three year period preceding filing of action and five years after execution of contract].

Lastly, under this Court's decision in *Felter v. Southern Pacific Transportation Co., supra.,* respecting union security agreements, it was found that "any agreement is *ineffective* as to an employee

who did not furnish the employer a written assignment in *conformity with the Act.*" (emphasis supplied) *Ibid.* at 334.

Given that the agreement herein made no provision for the sixty day grace period mandated by RLA Section 152 Eleventh, the United-AFA Agreement was perforce "ineffective" as to the petitioners' class as it pertained to the check-off of their dues payments to the AFA. And, any argument by the Court of Appeals that the AFA could contract away this requirement, whether through a third-party beneficiary contract or through collective bargaining is precluded. As previously quoted above, RLA Section 152 Eleventh "makes it clear that the organization was not to function as its members' agent in waiving their statutory rights." *Ibid.* at 336.

If then, the dues check-off procedures of the United-AFA Agreement were "ineffective" as to petitioners' class of 1202, the mere passage of time from the imposition of the procedures on February 11, 1986, through the filing of this action on December 28, 1987, cannot make those procedures effective or valid. To allow the passage of six months to effective "waive" an employee's right to require strict compliance with RLA Section 152 Eleventh would contravene the clear admonition of *Felter* against such waiver.

In short, the imposition of the check-off herein was void *ab initio* and the taking of all dues from the 1202 under the provisions of the United-AFA Agreement must be set aside and returned to the 1202 until such time as a valid agreement and assignment is executed in strict compliance with RLA Section 152 Eleventh; and, under *Felter* the limitations period is tolled until such a valid agreement and assignment are executed. See also: *Beck v. Communications Workers of America, supra.* at 741 (violations extended to dues deductions for the six months preceding the filing of the action, not back to the execution of the collective bargaining agreement).

For this reason, petitioners submit that good cause exists for the granting of this petition on the ground that the Court of Appeals' decision conflicts with the decisions within the Second and other Circuits and this Court. *Avco Corp. v. Aero Lodge 735,*

390 U.S. 557, 559 (1968); *Northeastern National Bank v. United States,* 387 U.S. 213, 217 (1967); *Wilkinson v. United States, supra.*

IV

THE COURT OF APPEALS DECISION RESPECTING THE APPLICABLE LIMITATIONS PERIOD FOR DFR VIOLATIONS PERTAINING TO AN ARBITRATION PROCESS CONFLICT WITH THE DECISIONS OF THIS COURT AND THE CIRCUITS

Notwithstanding the fact that all of respondents' DFR violations must be deemed "continuing," the argument that such violations were terminated or completed outside the six month limitation period is contrary to public policy and controlling DFR law respecting labor and management's obligations under a contractual arbitration process. The fact of the matter is that petitioners' claims of "compulsory unionism" and "discriminatory dues" were inextricably bound up with the provisions of the Seniority Arbitration Agreement and the arbitration of the petitioners' seniority status with United.

Most cases involving allegations of DFR violations by a union in connection with the grievance procedure involve isolated, discrete actions or inaction by the union at the beginning of, during, or at the close of the arbitration process. However, in all such cases, the limitations periods are measured from the issuance of the arbitration award since judicial interference prior to this point would inevitably interfere with the "private settlement of disputes." *DelCostello v. Teamsters, supra.* at 171-172 [both DFR violations measured from the date of the arbitration award].

Under the petitioners' view, once the issue was committed to the arbitration process by the negotiation of the Side Letter Arbitration Agreement on December 6, 1985, the six month limitation period was tolled until entry of the Award on September 26, 1987. To begin the running of the statute at any time prior thereto would encourage a multiplicity of suits and frustrate the federal labor policy in favor of arbitration and the "private settlement of disputes." Prior to the entry of the arbitration award

herein, the expectation and possibility, however unreasonable, existed that petitioners could have achieved full recovery under the award and could, thereby, avoid the incurrence of any damage that would give rise to a DFR claim. See: *Robinson v. Pan American World Airways, Inc.*, 777 F.2d 84, 87-89 (2nd Cir. N.Y. 1985); *West v. Conrail*, 107 S.Ct. 1538, 1541, n.2 (1987); *Hogan v. Brotherhood of Ry. Employees*, 817 F.2d 248, 250 (4th Cir. Va. 1987).

For this reason, petitioners submit that good cause exists for the granting of this petition on the ground that the Court of Appeals' decision respecting the applicable limitations period pertaining to an arbitration process conflict with the decisions of this Court and the Circuits. *Avco Corp. v. Aero Lodge 735, supra.; Northeastern National Bank v. United States, supra.; Wilkinson v. United States, supra.*

V

THE COURT OF APPEALS' DECISION RESPECTING THE APPLICATION OF AN ARBITRATION PROCESS UNDER THE RLA CONFLICTS WITH THE DECISIONS WITHIN THE SECOND AND OTHER CIRCUITS

The Court of Appeals' decision to the effect that the arbitration agreement was effective, under a third-party beneficiary theory and/or by the subsequent consensual participation of the petitioners, is in direct conflict with the holdings of the Second and Eighth Circuits. While the Court of Appeals attempts to distinguish its decisions in *American Renaissance Times, Inc. v. Saxis Steamship Co.*, 502 F.2d 674, 678 (2nd Cir. N.Y. 1974) and *Orion Shipping and Trading Co., Inc. v. Eastern States Petroleum Corp. of Panama, S.A.*, 312 F.2d 229, 301 (2nd Cir. N.Y. 1967), it made no mention of the holding of *Sanders v. Air Line Pilots Assn., Intern.*, 361 F.Supp. 670, 676-677 (D.C. S.D. N.Y. 1973) cited by petitioners.

In *Sanders*, a factually similar case to that herein, the District Court ruled that under the circumstances of the acquisition of Slick Airways by Airlift International, an award entered under a "tripartite" senior arbitration agreement between: (1) Slick Air-

ways and its successors, (2) the Airline Pilots Assn., Intern. (ALPA) and (3) the Flight Engineers International, was binding on Slick's successor, Airlift International, and the former pilot and engineering personnel of Slick. "[H]owever, the Airlift flight crew personnel *had not been a party to the tripartite agreement* and therefore were not bound by it." (Emphasis supplied) *Ibid* at 676.

If, then, ALPA could not bind the Airlift pilot personnel, whom it also represented at both Slick and Airlift, to the terms of its tripartite arbitration agreement which was found binding on their employer Airlift, by the same token, respondent AFA should not be allowed to bind the 1202 to the "bilateral agreement" it executed with United since the former Pan Am Flight Attendants "had not been a part of the (arbitration) agreement and therefore were not bound by it."

Indeed, a review of all reported seniority arbitration agreements, given judicial scrutiny under the RLA, fails to disclose a single instance where a collective bargaining representative was empowered to bind employees under an arbitration agreement, that were not its members of the bargaining unit at the time of execution. See: *Cook v. Pan Am.* 771 F.2d 635, 637 (2nd Cir. N.Y. 1985) (union of "employees involved" executed agreement).

But if doubt should still exist, the decision in *Beardsly v. Chicago & Northwestern Transp. Co.*, 850 F.2d 1255 (8th Cir. Ohio 1988) should erase all doubt. In *Beardsly* a mirror image of the instant case was played out under the auspices of the RLA. As in the instant case, the Defendant United Transportation Union (UTU) represented the majority employees of the purchasing carrier and negotiated a seniority agreement which prevented, as herein, the dovetailing of their prior dates of hire. However, "although the (UTU) did involved the union representative of the former Rock Island employees in preliminary discussion, these representatives were not present when the final agreements were reached, were not parties to these agreements, and had virtually no control over the terms of these agreements." *Ibid.* at 1261.

When, therefore, the minority employees demanded arbitration under the agreement for loss of their respective dates of hire, the issue was taken to arbitration. Ibid. at 1262. As in the instant case, during the pendency of the arbitration, the UTU changed its policy pursuant to an internal grievance procedure which resulted in a date of hire policy for acquired employees of purchased railroads. *Ibid.* at 1261-1263. However, without notice of this change of policy, as herein, the Arbitrator subsequently entered his award sustaining the prior seniority agreement which denied minority employees their date of hire rights. *Ibid.* 1263.

Confronted with these circumstances, the Eighth Circuit set aside the Arbitration Award based upon several premises. Citing *Jones v. Trans World Airlines,* 495 F.2d 790 (2nd Cir. N.Y. 1974), the Eighth Circuit emphasized that it was the duty of the majority UTU "to provide substantive and procedural safeguards for minority members of the collective bargaining agreement." *Jones,* at 798. The Eighth Circuit observed that to the extent that the UTU, as herein at AFA, deviated from the "standard practice" of dovetailing seniority in mergers and acquisitions based "on some sort of dovetailing" of the respective groups dates of hire (*Ibid.* at 1268), it questioned the neutrality of the UTU to represent the interests of the minority employees who "would adversely affect the seniority rights of the employees" of the acquiring railroad. *Ibid.* at 1269.

Equally significant in the view of the Eighth Circuit was the fact that the agreement was reached without the "*active and significant participation of the representatives of the former Rock Island employees*", (Emphasis on original—*Ibid.* at 1269), as contemplated by the UTU's Constitution. In this instance, the AFA Constitution also contemplated active participation of the minority employees in the determination of their seniority rights by providing a negotiation process with arbitration in the case of impasse, a process denied plaintiffs' class herein.

Given the *Beardsly* scenario, the Eighth Circuit set aside the Arbitration Award because the underlying agreement had been procured in breach of the UTU's DFR and by virtue of the fact that the arbitrator had not been provided with a notice of the

UTU's change of policy in favor of dovetailing seniority. *Ibid.* at 1269-1270.

As a result, the Eighth Circuit required the District Court "to order the parties to renegotiate an implementing agreement. . . . with the requirements that the minority employees will participate in an active and significant manner". *Ibid.* at 1271.

For this reason, petitioners submit that good cause exists for the granting of this petition on the ground that the Court of Appeals' decision conflicts with the decisions within the Second and other Circuits. *Avco Corp. v. Aero Lodge 735, supra*; *Northeastern National Bank v. United States, supra.*

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that good cause exists for the granting of this petition for writ of certiorari. Respectfully submitted,

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[APPENDICES TO FOLLOW]

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1092--August Term, 1990

(Argued February 22, 1991 Decided May 22,1991)

Docket No. 90-7885

Zlatko Gvozdenovic; Margarita Walinski; Patricia Cargould; Frank Perea, Individually and on behalf of that class of 1202 former Pan Am Flight Attendants Now Employed by United Airlines, Inc., and as Members of the Pan Am Seniority Arbitration Committee,

Plaintiff-Appellants,

-against-

United Air Lines, Inc.; The Association of Flight Attendants, AFL-CIO; and its President, Susan Bianchi-Sand; Au Rodney; Pamela Greenleaf, As members of the United Airlines Seniority Arbitration Committee; Patricia Friend, Chairperson of the United Airlines Master Executive Council; United Preacquisition Flight Attendants,

Defendants-Appellees.

Before:

Feinberg, Miner and Mahoney,

Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York (Griesa, J.), dismissing after bench trial class action suit brought by employees of Pan Am division acquired by United to vacate arbitral decision regarding method by which they were integrated into United's seniority list and alleging violations by union of statutory duties in

connection with arbitration and member ship in collective bargaining unit.

Affirmed.

John F. Henning, Jr., San Francisco, CA (Henning, Walsh & King, San Francisco, CA, Scott H. Robb, Robb & Henning, New York, NY of counsel), for Plaintiffs-Appellants.

Stephen B. Moldoff, New York, NY (Michael L. Winston, Cohen, Weiss & Simon, New York, NY, of counsel), for Defendants-Appellees Association of Flight Attendants, Susan Bianchi-Sand, Patricia Friend, and the "Pre-Acquisition United Airlines Flight Attendants".

Eric Rosenfeld, New York, NY (Maurice L. Miller, Seyfarth, Shaw, Fairweather & Geraldson, New York, NY, of counsel), for Defendants-Appellees

United Airlines, Inc., and Stephen Wolf.

Miner, Circuit Judge:

Plaintiffs-appellants appeal from a judgment entered on August 29, 1990 in the United States District Court for the Southern District of New York (Griesa, J.), dismissing a class action suite brought against defendants-appellees United Airlines, Inc. ("United") and the Association of Flight Attendants ("AFA"), asserted under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq., the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 411, 412 and provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11. In the complaint, appellants sought to vacate an arbitral award and sought damages, based on alleged breach of the statutory duty of fair representation, enforcement of compulsory union membership, improper dues assessment and breach of contract by appellees.

Appellants are 1202 former flights attendants of Pan American World Airways, Inc. ("Pan Am"), who began working for United after United purchase Pan Am's Pacific Division, in which they had been employed. On appeal, they contend that the district

court improperly dismissed their petition for vacatur of the arbitration award because they were not parties to the agreement providing for the arbitration and because certain conduct of the AFA during the arbitration violated its duty to represent all its members fairly. Appellants also argue that the district court improperly dismissed on statute of limitation grounds their claims that the AFA ran an illegal "closed shop" and unlawfully raised their union dues, and that United improperly had given financial assistance to incumbent United employees to engage in the arbitration.

We hold that, because appellants participated voluntarily and actively in the arbitration process, they are bound by its outcome and the district court therefore properly dismissed their petition to vacate the award. We also hold that appellants' claims of breach of the AFA's duty of fair representation, impermissible enforcement of compulsory union membership and improper financial assistance by United are time-barred. With regard to the unlawful dues increase claim, we hold that, under *Reed v. United Transp. Union*, 488 U.S. 319 (1989), appellants are not barred by the applicable statue of limitations from presenting this claim, but that it fails on its merits. Accordingly, we affirm that judgment of the district court.

BACKGROUND

On April 22, 1985, United entered into an agreement with Pan Am's Pacific Division. As part of the acquisition agreement, United promised to hire at least 1,202 of the Pan Am Pacific Division flight attendants and, "[s]ubject to agreement . . . with the collective bargaining representatives of Buyer's employees, . . . [to] give [the incoming flight attendants] full recognition to all period of service with" Pan Am.

On August 1, 1985, United and the AFA, the collective bargaining representative for United employees, began negotiations over a new collective bargaining agreement. An important issue to be resolved in the negotiations was the method of determining the seniority status of the 1202 incoming flight

attendants in relation to that of United's pre-acquisitions flight attendants. On December 6, 1985, representatives of United and the AFA entered into a Letter of Agreement setting out the terms and conditions of employment for the incoming flight attendants. The Letter of Agreement, ultimately incorporated into the collective bargaining agreement, was ratified by the AFA's members on March 14, 1986. The Letter of Agreement provided that the new employees would become AFA members on the date they commenced work with United and that the issue of their seniority status would be determined through arbitration in which the incoming flight attendants and the incumbent United flight attendants would be the only participants. The arbitration was to be financed largely by United. The Letter of Agreement also provided that "the arbitrator shall determine the appropriate method of integration, based upon equitable and contractual considerations. In making this or any other determination, the arbitrator shall . . . not reduce the seniority accrued by any United flight attendant."

On three successive dates, December 6, 1985, January 8 and 24, 1986, Pan Am Pacific Division flight attendants were notified in conditional offers of employment sent to them by United that their seniority rights were to be determined through this process. Pan Am's Pacific Division employees were guaranteed continued employment under their collective bargaining agreement with Pan Am and were under no compulsion to transfer to United. On February 11, 1986, the 1202 Pan Am flight attendants who had accepted United's offer of employment became flight attendants for United.

On March 7, 1986, United deposited $132,700 into each of the bank accounts it had opened for the 1202 incoming flight attendants and the incumbent United employees to cover their costs of arbitration. Both sides drew on their respective accounts for this purpose. The Independent Union of Flight Attendants ("IUFA"), which had represented the incoming flight attendants during their employment at Pan Am, selected a committee of five to represent the former Pan Am attendants in the arbitration. Similarly, the United Master Executive Council ("UMEC"), the AFA's representative body at United, created a five-member

committee to represent the incumbent United flight attendants. Each committee chose legal counsel, who in turn selected Arthur Stark to act as arbitrator.

The first arbitration hearing was held on June 27, 1986. The incumbent flight attendants argued that the seniority of the 1202 incoming flight attendants should be based on their date of hire by United, while the incoming flight attendants contended that they should receive full credit for their entire term of employment with Pan Am. In an interim decision issued on September 8, 1986, Arbitrator Stark decided that the new flight attendants would be integrated into the United seniority list. After additional hearings, he established in a final decision issued on September 26, 1987 an integration formula entitling them to partial credit for their service at Pan Am. Specifically, under Stark's formula, the first 1500 most senior employees on the integrated seniority list would be the first 1500 on the existing United list; thereafter, one Pan Am transferring flight attendant would be inserted on the list of United flight attendants on the basis of a ratio of 1:7.47. United revised the seniority list accordingly.

On December 28, 1987, the four appellants named individually as plaintiffs in this suit commenced the action, seeking relief against the AFA only, and, on May 5, 1988, amended their complaint to add several causes of action and United as a defendant. In the amended complaint, appellants alleged six causes of action: two claims of breach by the AFA of its statutory duty of fair representation, as implied under RLA § 2, 45 U.S.C. § 152; the unlawful imposition of union membership in violation of RLA § 2 (Eleventh)(b), 45 U.S.C. § 152 (Eleventh)(b); the denial of equal rights under the AFA constitution in violation of LMRDA § 101(a)(1), 29 U.S.C. § 411 (a)(1); and breach of the contract between the AFA and its members established by the union's constitution, and breach of the acquisition contract between United and Pan Am, in violation of New York contract law. In the amended complaint, appellants also moved to certify their suit under Fed. R. Civ. P. 23(b)(1)(A) and (B) as a class action, in which the interests of all 1,202 former Pan Am flight attendants would be represented. Later, in briefs submitted to the district court, appellants raised the additional claim of improper

financial assistance by United, in violation of RLA § 2 (Fourth), 45 U.S.C. § (Fourth).

After discovery, each side moved for summary judgment or judgment on the pleadings. At a hearing on January 17, 1990, the district court denied the motions and directed trial on the claim of breach of duty of fair representation which, it believed, also was dispositive of the petition to vacate the arbitral award, the denial of equal rights claim and the breach of contract claim. A bench trial was held before Judge Griesa on March 29 and 30, 1990. On the latter date, he decided the issues of whether the Letter of Agreement was void and whether the inclusion in the Letter of Agreement of the provision that the arbitrator "could not reduce seniority accrued by any United flight attendant" constituted a violation of the AFA's duty to represent the 1,202 fairly. Judge Griesa determined that the agreement was not void and that plaintiffs were bound by it because of their willing participation in the arbitration, and that the no-reduction provision did not prejudice the placement of the 1,202 incoming flight attendants on United's seniority list. Judge Griesa then dismissed all claims relating to the duty of fair representation.

In an Opinion dated August 17, 1990, Judge Griesa dismissed the remaining claims of unlawful imposition of union membership and illegal financing, finding that they were barred by a six-month statute of limitations. In the opinion, Judge Griesa also formally confirmed the class status of the action.

DISCUSSION

I. Validity of Arbitration Award

Appellants content that the Letter of Agreement, in which United and the AFA agreed to submit the seniority issue to arbitration, is void because it was entered into before their employment with United effectively began. Because they were neither formal employees of United nor members of AFA at the time of the Letter of Agreement, appellants argue, they could not be parties to any arbitration agreement and are not bound by the arbitral outcome. See *American Renaissance Lines, Inc. v. Saxis*

S.S. Co., 502 F. 2d 674, 677 (2d Cir. 1974); *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F. 2d 299, 300-01 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963).

Although a party is bound by an arbitral award only where it had agreed to arbitrate, an agreement may be implied from the party's conduct. See *Teamsters Local Union No. 764 v. J. H. Merritt & Co.*, 770 F. 2d 40, 42 (3d Cir. 1985); *cf Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982) ("[i]t is hornbook law that parties by their conduct may agree to send issues outside an arbitration clause to arbitration."). Here, appellants' conduct manifested a clear intent to arbitrate the dispute. The record demonstrates their active and voluntary participation in the arbitration; for example, through the IUFA, they chose a committee to represent them in the arbitration, and, on their behalf, the committee withdrew funds from the bank account set up to cover its expenses, chose counsel to represent the transferring flight attendants in the arbitration and argued vigorously that they should receive full credit for their time of employment with Pan Am. Also, there is no evidence that, at any point before or during the arbitration, appellants objected to the process, refused to arbitrate or made any attempt to seek judicial relief.

Appellants' reliance on *Saxis* and *Orion Shipping* is misplaced because those cases involved commercial, not labor, arbitration. Under the RLA, terms and conditions of employment for unionized employees are established through collective bargaining between the employer and the union representative for the bargaining unit. 45 U.S.C. § 152 (First) (duty of carriers and employees to settle disputes), (Fourth) (collective bargaining); see also *Order of R.R. Telegraphers v. Chicago & N. Western Ry. Co.*, 362 U.S. 330, 339 (1960); *Virginian Ry. Co. v. System Fed'n No. 40, Ry. Employees Dep't of the Am. Fed'n of Labor*, 300 U.S. 515, 547-48 (1937). Unlike a standard commercial contract, a collective bargaining agreement binds both those members within a bargaining unit at the time the agreement is reached as well as those who later enter the unit. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335-36 (1944); see *Wood v. National Basketball Ass'n*, 809 F.2d 954, 960 (2d Cir 1987); *NLRB v. Laney & Duke Storage*

Warehouse Co., 369 F.2d 859, 866 (5th Cir. 1966). Thus, the 1202 incoming flight attendants are bound by the collective bargaining agreement, including its arbitration provision, even though they were not involved in the negotiation preceding it or employed by United at the time of the negotiation. As the district court found, they were effectively third-party beneficiaries of the Letter of Agreement. See *J.I. Case Co.*, 321 U.S. at 336.

Similarly, appellants' reliance on *Beardsly v. Chicago & N. Western Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) is misplaced. Unlike *Saxis* and *Orion Shipping*, *Beardsly* implicated a labor arbitration. However, in *Breadsly* the agreement establishing the seniority status of employees who were hired by Chicago & Northwestern after it had purchased the railroad that employed them was reached without the involvement of the new hires, despite their repeated requests to participate and objections to the arbitration. *Breadsly*, 850 F.2d at 1262-63, 1269-70. By contrast, appellants here were permitted to participate and did so without objection.

Appellants also argue that the arbitrator's award should be vacated because, under 9 U.S.C. § 10(a), it was reached through "fraud on the arbitration process." This contention is based on the fact that the AFA failed to inform either the 1202 incoming flight attendants or the arbitrator of an amendment to its constitution, proposed in November 1986 and formally ratified in June 1987, regarding its policy for seniority integration in a merger with an airline whose employees are not represented by the AFA. Under the amendment, seniority integration would "be accomplished by compiling an integrated seniority list in the same manner as provided for seniority integration between flight attendants on AFA carriers." New Section J.2., AFA Constitution, Rev. 87 (emphasis added). We reject appellants' contention. The adoption of the AFA amended merger policy was prospective in nature and expressly inapplicable to the United-Pan Am merger transaction.

Appellants' final argument for vacatur is that the AFA breached its duty to represent all of its members fairly, as required by the RLA. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Although the district court addressed this argument on its merits,

the duty of fair representation claim may be dismissed as barred by the applicable statute of limitations, as the district court found with the more specific claims of violation of the RLA. In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-71 (1983), the Court held that the six-month limitations period of the National Labor Relations Act applies to claims of breach of duty of fair representation. In this case, the period began to run, at the latest, as of the date the AFA ratified the allegedly violative agreement, March 14, 1986, by which time the 1202 incoming flight attendants already had begun working for United and were aware of the terms of the Letter of Agreement. See *Local Lodge No. 1424, I.A.M. v. NLRB*, 362 U.S. 411, 415-19 (9160); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1273 (7th Cir. 1985); *Englehardt v. Consolidated Rail Corp.*, 594 F. Supp. 1157, 1172 (N.D.N.Y. 1984), *aff'd*, 756 F.2d 1368 (2d Cir. 1985). The action was not commenced until December 28, 1987 and thus is time-barred.

Moreover, even on its merits, the argument must fail. As the exclusive bargaining representative of United flight attendants, the AFA had a duty under section 8(b) of the National Labor Relations Act, 29 U.S.C. § 158 (b), to represent all of those employees, including the Pan Am transferees, both in collective bargaining with United and in enforcing the resultant collective bargaining agreement. See *Air Line Pilots Ass'n v. O'Neill*, 59 U.S.L.W. 4175, 4179 (Mar. 19, 1991); *Vaca*, 386 U.S. at 177. "[T]he exclusive agent's statutory duty to represent all members of a designated [bargaining] unit includes a statutory obligatio to serve the interests of all members without hostility of discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177; see also *Air Wisconsin Pilots Protection Comm. v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990), cert. denied, 111 S. Ct. 958 (1991).

Review of the terms negotiated by a union to determine whether the union breached its duty of fair representation "must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *O'Neill*, 59 U.S.L.W. at 4179. A breach by the union

exists only where it is established that the terms negotiated "can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that [they are] wholly 'irrational' or 'arbitrary.' " *Id.* (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

It cannot be said that the decisions of United and the AFA to allow an arbitrator to determine the competitive rights of the appellants was arbitrary, discriminatory, in bad faith, or wholly outside a wide range of reasonableness. The AFA was faced with two groups of its members with objectives that were directly at odds. Submission of the impending dispute to arbitration was an equitable and reasonable method of resolving it. Appellants fail to demonstrate that their interests were not fully represented in the arbitration proceedings. See *Cook v. Pan Am. World Airways, Inc.*, 771 F.2d 635, 645 (2d. Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986) (no violation of union's duty of fair representation where evidence demonstrated that all interests of all employee groups were represented vigorously throughout proceedings). We therefore agree with the district court's finding that the 1202 incoming flight attendants and the incumbent employees were treated under the arbitration agreement "with perfect parity."

II. Appellants' remaining claims

Appellants allege that the mandate in the Letter of Agreement that they become members of the AFA immediately upon commencement of their employment violated RLA § 152 (Eleventh)(a), which permits a carrier to agree with a union that all employees covered by a collective bargaining agreement will become union members within sixty days of beginning employment. They also contend that, because deductions from their paychecks for union dues began immediately upon hire, the AFA violated LMRDA § 411(a)(3). Finally, they argue that the bank accounts opened by United constituted an illegal grant of financial assistance to the incumbent flight attendants, under RLA § 152 (Fourth).

The district court found that the claims of denial of a 60-day grace period, illegal financial assistance and unlawful dues assessment were time barred. With regard to the first two claims, we believe that the district court's decision was correct. The com-

mencement of the suit on December 27, 1987 was more than six months after both the date on which appellants were required to become AFA members, February 11, 1986, and the date of which the Letter of Agreement was ratified, March 14, 1986. Thus, the six-month period in which appellants were required to protest any unlawful denial of a sixty-day grace period or unlawful financial assistance had lapsed. *Cf. DelCostello*, 462 U.S. at 172; *Robinson v. Pan Am. World Airways, Inc.*, 777 F.2d 84, 87-89 (2d Cir. 1985). Likewise, appellants' argument that continued hiring of former Pan Am flight attendants and withdrawals by the Pan Am arbitration committee from the finance account up until the time of the arbitration award bring the claims within the six-month statue of limitations is meritless. These claims do not allege "continuing" violations because any "vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered." *Local Lodge No. 1424*, 362 U.S. at 423.

With regard to appellants' claim under LMRDA § 411 (a)(3) of an illegal dues increase, we hold that *Reed v. United Transp. Union*, 488 U.S. 319 (1989), requires that we apply New York's three-year statute of limitations for personal injury actions, rather than "borrow" the six-month limitations period specified in the National Labor Relations Act, as the district court did. See *Rodonich v. House Wreckers Union Local 95 of Laborers' Int'l Union*, 817 F.2d 967, 977 (2d Cir. 1987). The district court erred in relying on *Gordon v. Winpisinger*, 630 F. Supp. 1276 (E.D.N.Y. 1986) as authority for holding that appellants' claim was barred by the six-month statute of limitations, because *Reed* directly overrules the holding in that case.

The rationale of *Reed*—that a claim under Title I of the LMRDA does not directly challenge the stable relationship between the employer and the union, 488 U.S. at 331, and therefore is not subject to the NLRA limitations period—applies to this case, in which appellants' Title I claim stems from an internal union dispute which had little direct, destabilizing effect on the relationship between United and the AFA. Although *Reed* involved a "free speech" claim under section 411(a)(2), which

may be more clearly essential to the maintenance of union democracy than a claim under section 411(a)(3), "Title I claims all serve the core function of enhancing union democracy through enforcement of the rights of union members, *not* of protecting the integrity of collective bargaining or of grievance-and-arbitration procedures." *Reed*, 488 U.S. at 331 n.6 (emphasis in original).

However, even though the section 411(a)(3) claims is not time-barred, we hold that it properly was dismissed. Besides the simple fact that appellants have produced little evidence of any illegal dues assessments or increases, the sixty-day grace period of the United-AFA collective bargaining agreement, upon which they base their "unlawful dues increase" claims, applies only to conventional, newly-hired employees, not to individuals hired laterally as a result of a merger. The section provides that "[n]ewly employed flight attendants" must apply for AFA membership within sixty days of commencing employment, and "shall be admitted to membership in the Union upon expiration of their probationary period as defined in . . . the Agreement." During the probationary period, "the seniority provisions of [the collective bargaining agreement] do not apply to flight attendants unless retained in the service of the Company after the probationary period," and "[t]he service of flight attendants may be terminated at any time during the probationary period without a hearing." However, the Letter of Agreement excused the incoming flight attendants from having to undergo a probationary period, and gave them other unique employment benefits because of the circumstances under which they were hired. Thus. it seems clear that the incoming flight attendants were not "newly employed flight attendants" as defined in the collective bargaining agreement and were constrained to pay the AFA dues immediately upon commencing employment.

CONCLUSION

We affirm the judgment of the district court dismissing appellants' complaint in its entirety.

APPENDIX B

United States District Court
Southern District of New York

Zlatko Gvozdenovic, et al.,
Plaintiffs,

- against -

United Airlines, Inc., et al.,
Defendants.

87 Civ. 9243
(TPG)

OPINION

This action under the Railway Labor Act, 45 U.S.C. §§ 151 et seq., is brought by 1,202 flight attendants formerly employed by Pan American World Airways who began working for United Airlines after United purchased the Pacific Division of Pan American.

Plaintiffs' primary claim is that the arbitration fixing their seniority status vis-a-vis United's flight attendants violated the Act and that the arbitration award should be set aside. This basic claim is the subject of the first, second, fourth, fifth and sixth causes of action in the amended complaint filed May 5, 1988. Plaintiffs also assert claims of two other violations of the Act: (1) that plaintiffs, or most of them, were required to become members of defendant Association of flight Attendants ("AFA") pursuant to an illegal agreement between AFA and United; and (2) that United's funding of the seniority arbitration was illegal, even if the arbitration in other respects was valid. The membership claim is the subject of the third cause of action in the amended complaint. The funding claim is not asserted in the complaint but was presented in the motion papers.

A two day non-jury trial was held on March 29 and 30, 1990, after which the court made partial findings of fact and conclusions of law from the bench. The court dismissed the claim seeking to have the arbitration award vacated, thus dismissing the first,

second, fourth, fifth and sixth causes of action. The court reserved decision on the membership and funding claims.

The present opinion constitutes the court's decision on the latter two claims. It is determined that they should be dismissed as barred by the statue of limitations.

It should be noted that this is a class action. Four named plaintiffs are representing themselves and the other members of the class—a total of 1,202 persons. This opinion refers to the 1202 as "plaintiffs." An appropriate motion for class certification was filed. This motion was not opposed. The case went to trial as a class action. The court now formally confirms that this is a class action on behalf of the 1202 persons under Fed. R. Civ. P. 23(b)(1).

FACTS

In April 1985 United entered into an agreement with Pan American to acquire its Pacific Division. As part of the transaction, United was required to offer employment to the Pan American flight attendants who had worked in that division.

In the fall of 1985 United commenced negotiations with AFA concerning rules for seniority integration of the Pan American attendants and changes in the basic United collective bargaining agreement which was up for renewal the following spring. By letter of November 25, 1985 United informed the Pan American attendants that under the terms of a tentative agreement, their competitive seniority would be determined by arbitration to which the two groups, the United Attendants and the Pan American attendants, would be parties. Competitive seniority is a relative measure of tenure which bears on an employee's ability to successfully bid for a particular station or flight assignment.

On December 6, 1985 United and AFA executed a letter agreement (the "December Agreement") which extended the basic collective bargaining agreement and established certain rules with respect to the incoming Pan American attendants. Two features of the December Agreement are relevant to the remaining claims in this action. First, it provided that the Pan American

attendants would become AFA members on the date them commenced work with United. Second, it provided that United would pay the costs of the seniority arbitration.

The provision about immediate membership in AFA treated the incoming Pan American attendants somewhat differently from ordinary new employees of United as governed by the basic collective bargaining agreement. This basic agreement, as it existed before the acquisition of the Pan American division, and as it has existed since that time, allows new flight attendants a grace period of 60 days in which to apply for membership. Moreover, the collective bargaining agreement gives the employees the option of becoming regular AFA members or assuming "financial core status," whereby they do not become members, but pay a monthly service fee for its representation in collective bargaining matters.

AFA's membership ratified the December Agreement on January 22, 1986, to take effect on February 11,1986. On January 24, 1986, United sent each of the Pan American flight attendants a mailgram, offering employment and describing the December Agreement. No Pan American attendant was compelled to join United.

A total of 1,202 former Pan American attendants (now plaintiffs in this action) went to work for United commencing February 11, 1986. About 85% of them became members of the Association in accordance with the December Agreement. The remaining 15% did not become members but elected to take "financial core status." Although the December Agreement did not expressly provide for the financial core option, AFA apparently did not object to its use.

On March 7, 1986 United deposited approximately $265,000 on account to cover the seniority arbitration costs, as stipulated in the December Agreement.

The United and Pan American attendant groups each selected a committee to represent their interests in the arbitration. These committees chose counsel who in turn agreed upon an arbitrator. Neither United nor AFA was a party to the arbitration.

After conducting hearings, the arbitrator issued his decision and award on September 26, 1987. PLaintiffs filed this suit on December 28, 1987.

DISCUSSION

The AFA Membership Claim

The Railway Labor Act contains a provision permitting a Carrier to agree with a union that all employees covered by the agreement will become members of the union within 60 days following the beginning of employment, provided that membership must be available to all the affected employees on the same terms and conditions. 45 U.S.C. § 152 Eleventh (a)

The third cause of action in the amended complaint, as somewhat modified by various later submissions by plaintiffs, attempts to assert a claim that this statutory provision has been violated.

The latest articulation of this claim was made by plaintiffs' attorney at the trial in March 1990. At that time the attorney argued that plaintiffs "were forced to become members" of AFA and were not granted the "60-day election period which the law requires." The attorney argued that "we are entitled to get our dues back" for the entire period of membership. The further request is that the court should order that plaintiffs now have a 60-day period in which to choose whether they want to join the union or not.

Defendants contend that this claim regarding AFA membership is barred by the statute of limitations.

The Railway Labor Act does not specify a statute of limitations. Where a federal statute is silent as to a limitation period, courts generally borrow the limitation period from an analogous state law. However, in dealing with some federal labor law claims, courts look to analogous federal cause of action for limitation periods. See: *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). It is by now well settled that the six-month statute of limitations from § 10 of the National Labor Relations Act, 29 U.S.C. § 160(b), governs a claim such as this one under § 2, Eleventh of the Railway Labor Act. *Coyle v.*

Brotherhood of Railway, Airline and Steamship Clerks, 838 F.2d 1404, 1406-7 (5th Cir. 1988); *Hogan v. Brotherhood of Railway, Airline, and Steamship Clerks*, 817 F.2d 248, 250 (4th Cir. 1987)

With regard to the present case, plaintiffs' alleged cause of action accrued when them commenced employment with United and were simultaneously required to become AFA members (or assume the financial core status). This was February 11, 1986. The December 28, 1987 date of commencement of suit was more than six months thereafter.

Plaintiffs argue that this is a claim of a continuing violation extending to the present time, that the cause of action has never accrued and that there is not statute of limitations bar. However, when plaintiffs' attorney attempts to explain his theory, he asserts nothing more than the contention that there a few former Pan American attendants who did not become employed on February 11, 1986, and who either become employed at a later date or might still become employed at some future date. See: Plaintiffs' Memorandum of August 10, 1988, p. 5. But such persons *are not plaintiffs* in this action. The are not included in the group of 1202. The 1202 plaintiffs are solely those who commended employment on February 11, 1986. *Their* claims about immediate compulsory union membership (or financial core status) unquestionably accrued on February 11, 1986. The question of accrual dates for persons entering employment at a later time is irrelevant to plaintiffs.

It is also well to note that any contention by plaintiffs of current *injury*, by virtue of their continued AFA membership, would not support a continuing violation theory for statue of limitations purposes. The theory applies only to an ongoing *violation* not to continuing adverse effects of a past violation. *United Air Lines v. Evans*, 431 U.S. 553, 558 (1976); *Engelhardt v. Consolidated Rail Corp.*, 594 F.Supp. 1157 (S.D. N.Y. 1984), *affd'* 757 F.2d 1368 (2nd Cir,. 1985).

Almost as an aside, plaintiffs claim that AFA's failure to give them a 60-day grace period was an illegal dues increase in violation of § 101(a)(3) of the Labor Management and Reporting Disclosure Act, 29 U.S.C. § 411(a)(3). This cause of action

is also barred by a six-month limitations period adopted by the courts for § 101 claims. *Gordon v. Winpisinger*, 630 F.Supp. 1276 (E.D. N.Y 1986), and the cases cited therein.

The Arbitration Funding Claim

Plaintiffs also contend that United violated § 2 Fourth of the Railway Labor Act by funding the seniority arbitration. That statute provides:

> [I]t shall be unlawful for any carrier . . . to use funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining. . . .

45 U.S.C. § 152, Fourth. This claim is not asserted in the complaint but only in later briefs.

The court finds that the claim is time-barred under the six-month limitation period from § 10(b) of the National Labor Relations Act, chosen by the Second Circuit to govern claims under § 2, Fourth of the Railway Labor Act. See: *Robinson v. Pan American World Airways*, 777 F.2d 84, 87-9 (2nd Cir. 1985). United's payment of funds for the arbitration occurred on March 7, 1986, and the alleged cause of action accrued at that time. This suit was filed more than a year later.

CONCLUSION

By virtue of the rulings made from the bench at the trial and the rulings made in this opinion, all claims asserted by plaintiffs in this action are dismissed.

SO ORDERED.

Dated: New York, New York

THOMAS P. GRIESA
U.S.D.J.

August 17, 1990

APPENDIX C

United States District Court
Southern District of New York

Zlatko Gvozdenovic, et al.,
Plaintiffs,

- against -

United Airlines, Inc., et al.,
Defendants.

87 Civ. 9243 (TPG)

Trial Court Decision
March 30, 1990

DECISION OF THE COURT

THE COURT: I think I had better put some rulings on the record on the issues which I am prepared to decide, and those issues are as follows: The question of whether the arbitration agreement was void. The question of whether the arbitration provisions were inherently unfair and invalid by virtue of Paragraph B1(h)(ii) of the arbitration agreement, which has been the principal focus of the litigation as it has emerged. And the question of whether the union breached its duty in fair representation.

I was hoping to be able to rule on all the issues in the case today, but I will have to reserve decision and issue a further ruling on two points, that is, the claim that funding by United Airlines was unlawful, and the claim that the Pan American people were deprived of the statutory right to have 60 days to decide whether to join the new union.

The reason I am deciding some of the issues today is that the result, it seems to me, is quite clear. There has been presentation of lengthy argument in papers, a lengthy discussion off the record in January, and now two days of trial. I have no need for post-trial briefs, and there is no reason to delay this partial ruling, and I think it will be efficient to get it on the record.

It should be noted that the trial we had has been without jury, and what I put on the record now and at a later point, a further decision that I issue later, will constitute the Court's findings of fact and conclusions of law.

This case arises from an agreement dated April 22, 1985, between Pan American Airways and United Airlines in which the Pacific ocean service of Pan American was sold to United.

The dispute which this case involves is a dispute regarding the flight attendants who were employed by Pan American in its Pacific service. About 1,200 of them decided to move over to United Airlines and certain problems arose from the move.

It should be noted that at the time the flight attendants were employed by Pan American they were represented by their union, which was called the Independent Union of Flight Attendants, or IUFA. This was not the same union as the one which represented the United Airlines flight attendants. The latter union is the Association of Flight Attendants, known as the AFA; it is a defendant here.

United Airlines is a defendant. And the action is brought as a class action on behalf of certain former Pan American flight attendants who moved over to United Airlines.

Going back to the facts of the dispute:

Following the agreement between Pan American and United of April 1985, a dispute arose about how the Pan American flight attendants would be integrated for seniority purposes with the United flight attendants. This, of course, came to the attention of United Airlines, and United Airlines suggested that the matter be arbitrated.

It was contemplated that the Pan American flight attendants, or at least many of them, would become members of AFA, and an arbitration agreement was negotiated between United Airlines and AFA during the final months of the year 1985. This arbitration agreement related specifically to the problem of the flight attendants, and after it was concluded, it was signed and dated as of March 14, 1986.

The approximately 1,200 Pan American flight attendants became employees of United Airlines on February 11, 1986. They needed to be integrated for seniority purposes into approximately 11,000 United Airlines flight attendants.

It should be noted that no Pan American flight attendant was required to move over to United Airlines. Those who did move did so voluntarily.

The arbitration arrangement contemplated in the arbitration agreement was that the arbitration would be between the two groups of flight attendants: the former Pan American attendants and the United attendants. Both were groups at least most of whom were members of AFA.

It was contemplated that United Airlines would make payments to the two groups in order to finance the arbitration and in order to allow each group to obtain counsel and otherwise participate in the arbitration. United Airlines would pay the fees of the arbitrator, also.

United Airlines was not to be a party to the arbitration, nor was AFA, as such. The arbitration was between the two groups. The arbitration agreement contained certain provisions which have been focused on heavily in this proceeding.

Paragraph A of the arbitration agreement provided that: "For purposes of compensation, Pan Am flight attendants hired by United Airlines will be given full credit for their flight attendant seniority at Pan Am, adjusted on the same basis as United flight attendants."

Paragraph B provided that "The competitive seniority of Pan Am flight attendants shall be determined in accordance with the following procedures." Certain procedures were then laid out which are not required to be summarized here. But those procedural provisions contain subparagraph 1(g) and 1(h), which are extremely important to this proceeding.

Subparagraph 1(g) provided that "The arbitrator shall initially determine whether any competitive seniority credit shall be awarded to the former Pan American flight attendants."

In other words, it was possible, as an initial proposition, that all the Pan American flight attendants would be simply put at the bottom of the seniority list. And the first duty of the arbitrator was to determine whether this should or should not be done as a basic proposition.

Subparagraph 1(h) went on to provide that in making this or any other determination, the arbitrator shall do certain things or refrain from certain things, and the agreement went on to contain subdivisions (i) through (iv). (i) provided that the arbitrator should maintain the relative positions of the United flight attendants on their seniority list and of the former Pan Am flight attendatns on the Pan Am seniority list. (ii) provided that the arbitrator shall "not reduce the seniority accrued by any United flight attendant." (iii) provided that the arbitrator shall not impose any negative operational or cost impact on United. (iv) is not required to be described here.

Now, the testimony has provided the court with certain definitions of crucial terms used in the arbitration agreement.

Paragraph A refers to the seniority of the former Pan Am flight attendants. This simply means the length of service of those Pan Am attendants, adjusted for certain purposes.

This adjusted length of service is used, or was to be used for purposes of compensaiton. In and of itself, this seniorithy had nothing to do with competition between flight attendants or among flight attendants or assignments, et cetera.

As I've indicated, Paragraph A provided that the seniority of the Pan Am attendants should be adjusted on the same basis as that of the United flight attendants.

Paragraph B introduces the concept of competitive seniority, and competitive seniority means the ranking of the flight attendants on a list in order of seniority. The evidence is that, in connection with the airline industry, the main significance of competitive seniority is to determine which of several flight attendants who are applying for stationing at a particular location or are applying for particular flights will receive the desired assignment.

Subdivision B1(h)(ii) uses the phrase "seniority accrued." Plaintiff's expert defined this quite clearly as referring to the seniority or length of time of service accrued and made it clear that this term does not refer to competitive seniority.

Thus, we see that the arbitration agreement contains different terms used for different purposes. There is the term "seniority" or "accrued seniority," and then there is the different and distinctive term "competitive seniority."

Following the making of the arbitration agreement, the arbitration went forward before an arbitrator by the name of Arthur Stark. He handed down decisions, deciding the issues presented to him. He handed down an Interim Award of Arbitrator, July 14, 1986. Then a second Interim Award of Arbitrator, September 8, 1986. His Final Opinion and Award was handed down on September 26, 1987, and that same date he issued a further document with certain specifics of his relief, called "Award of Arbitrator." That was dated September 26, 1987.

In these various decisions, the arbitrator determined that the Pan Am flight attendants would be awarded competitive seniority credit. He further determined the method by which the Pan Am flight attendants would be integrated into the United system seniority list.

Based on factors which are carefully and thoroughly described in his metriculous decisions, he determined that in the new seniority list, the first 1,500 flight attendants would be the first 1,500 on the existing United seniority list.

After this, the integration would be performed on a ratio basis with one Pan Am transferee placed on the list for every 7.47 United flight attendants. This meant that a Pan Am name would be inserted after every 7 or 8 United flight attendants on the list.

A new list was created which contained information designed to carry out all phases of the agreement as amplified by the arbitration award. The combined set of Pan Am and United flight attendants was ranked in order dictated by the award. In the new list two sets of dates were given. One date was given for each flight attendant, both former Pan Am and United, and that was

the date reflecting their adjusted seniority. This would be the date that they stated work, subject to adjustment for such factors as leave of absence and so forth.

This date was obviously set forth pursuant to Paragraph A of the arbitration agreement, which provided that, for purposes of compensation, the Pan Am flight attendants would be given full credit based on their flight attendant seniority, adjusted on the same basis as that of United flight attendants.

There was another set of dates reflecting the fact that the United Airlines management was maintaining the service dates and the adjusted seniority of their own flight attendants exactly the same now as it had been.

For purposes of competitive seniority, there was no need to change the dates of the United Airlines people, and subparagraph B1(h)(ii) forbad that to be changed.

However, when the Pan Am people were slotted in, it was inevitable that their Pan Am dates, as adjusted, might not fall chronologically into the list, and a chronological listing was necessary for the competitive seniority list, according to the evidence which has been presented to the court.

Therefore, this second list, this competitive seniority list, was accomplished by having dates assigned to each of the former Pan Am flight attendants to correspond with the same date as the date of the United flight attendants immediately above them.

This was provided in the Award of Arbitrator, dated September 26, 1987.

Now, we come to the issues in the case and the necessary findings of fact and conclusions of law.

Plaintiffs have made certain claims, all but two of which I am dealing with today.

Plaintiffs claim that the arbitration agreement was void because they were not parties to it. In this connection, plaintiffs readily agree with the obvious, that is, that there was a dispute which required arbitration. This is not a situation where a party is attempting to resist arbitration. The plaintiffs agree that arbitra-

tion was the proper procedure for resolving the dispute. Indeed, a committee of the former Pan Am flight attendants participated in the arbitration with counsel. So the problem is not with the arbitration as a concept.

The argument of the plaintiff really boils down to an attack on the fairness of the arbitration agreement in one respect, and that relates to subparagraph B1(h)(ii), which forbids the arbitrator to reduce the seniority accrued by any United flight attendant. This is the heart of the case.

It is this that is said to have rendered the arbitration agreement improper and void. It is this which is said to have made the arbitration itself unfair.

The claim is that the United flight attendants were given a benefit and a guarantee by this provision which was not conferred upon the Pan Am flight attendants. It is said that in some way this required and forced the arbitrator to give a preference to the United flight attendants in integrating the two lists for purposes of determining the ultimate competitive seniority.

In addition to the claims which I have just discussed, there is a general claim against AFA of failure to perform the duty of fair representation.

The first issue to be dealt with is the claim that the arbitration agreement was void because plaintiffs were not parties to it.

It is generally true that a person cannot be bound by an arbitration agreement and a person cannot be required to participate in an arbitration unless that person is a party to the arbitration agreement.

Here, plaintiffs did not themselves enter into or sign the arbitration agreement of March 1986.

However, in my view, this in no way renders the arbitration agreement void.

United Airlines and AFA entered into an arbitration agreement dealing with an unusual situation. The arbitration was not to determine an issue between United Airlines and AFA. The matter was more complex.

The dispute was an issue two groups, that is, the Pan Am flight attendants, who were going over to United Airlines, and the existing United Airlines flight attendants.

The Pan Am flight attendants had been members of their own union, but their union—the old union which they had at Pan Am —could not properly represent them in their problem as employees at United Airlines. If their old union, IUFA, had purported to sign an arbitration agreement, there would have been considerable doubt about the standing of IUFA to enter into any such agreement. So the agreement was properly entered into by United Airlines and AFA.

One could, as an initial proposition, ask why representatives of the Pan Am flight attendants and representatives of the group of United Airlines flight attendants did not sign the arbitration agreement. However, the evidence makes clear that both groups understood what was being done, consented to it, and felt they were greatly benefited by it. In effect, they were third-party benficiaries of the arbitration agreement of March 1986.

It is certainly possible that the Pan Am flight attendants, being nonsignatories to the arbitration agreement, might have objected to it and might have refused to arbitrate under it. However, they did no such thing. They exercised their rights as beneficiaries of that agreement. They accepted the funds provided by United Airlines to carry on the arbitration and to employ counsel. A committee representing the Pan Am flight attendants was appointed and was active in the arbitration, as was a committee representing the United Airlines flight attendants. The United Airlines flight attendants' committee also received funds from United Airlines, employed counsel, and fully participated in the arbitration.

Therre is no basis whatever, under these circumstances, for holding that the procedures by which the arbitration agreement was arrived at were improper or were such as to now void the entire arbitration process.

This still leaves the issue of whether, in regard to the particular provision in question, that is, subparagraph B1(h)(ii), this provision was inserted unfairly and improperly and in breach of the

duty of AFA to fairly represent its members, including the group which had come over from Pan American.

Surely, AFA had a duty of fair representation, and if it was to enter into an agreement for these two groups to arbitrate, it is surely the case that AFA had a duty to insure that the provisions of the arbitration agreement were fair and were not tipped in favor of either side.

If this subdivision (ii) was unfair to the Pan Am flight attendants and if the arbitration based upon it was unfair, then the plaintiffs in this case would have a right to relief.

This is the issue which has occupied most of the debate and almost all of the evidence presented at the trial. As I say, it is the heart of the case.

Subdivision (ii) provided that the arbitrator could not reduce the seniority accrued to any United flight attendant. Plaintiffs contend that this provision dictated that the United attendants would be put in a preferred position in regard to competitive seniority.

The trouble is that there is no merit whatever to the position of plaintiffs.

The simple and clear and conclusive fact is that Subdivision (ii) in no way dictated or affected how the arbitrator would deal with the competitive seniority position of the Pan Am flight attendants.

(ii) dealt with accrued seniority and provided that the arbitrator could not reduce the seniority accrued by any United flight attendant. This in no way reached or touched the question of the relative rank of the United flight attendants vis-a-vis the new Pan Am people. It is apparent from the text, and it is even more apparent when the evidence of the background of the agreement is considered, that this is the case.

Accrued seniority is most significant with regard to compensation and other financial benefits.

The court finds, on the basis of the text of the agreement and the credible testimony, that the United Airlines management

wished to have a provision preventing the arbitrator from changing the seniority dates of the United flight attendants so as to prevent their compensation being changed.

United Airlines' management wanted to avoid that and asked that that provision be inserted in the arbitration agreement. But this in no way affected how the Pan Am flight attendants were to be integrated for purposes of relative ranking with the United flight attendants for purposes of bidding on stations and flights.

This finding is supported by the overwhelming evidence in the case. It is so conclusively proved that there really can be no shred of a valid dispute about it.

One of the two witnesses called by plaintiffs at this trial was Michael Staudt, who was on the Pan Am flight attendants committee. His deposition was taken, and excerpts were read into evidence, and he admitted over and over and over in a number of forms that Subdivision (ii) in no way affected the ability of the arbitrator to place Pan Am flight attendants on the competitive list in any way which the arbitrator deemed to be equitable.

(ii) was no limitation at all on the power of the arbitrator with regard to competitive seniority, and it is competitive seniority which is the subject of the present action. No one is claiming improper compensation or claiming any problem about seniority in that regard.

Now, I should address another point. Plaintiffs' attorney has repeatedly tried to emphasize that (ii) tips the playing field, so-called, and takes away the required even playing field because it refers only to United flight attendants.

The text of the agreement shows that this is simply not the case.

There is, indeed, a comparable provision regarding the Pan Am flight attendants. The playing field is even. On the subject dealt with by (ii), both the Pan Am flight attendants and the United flight attendants are treated with perfect parity in this agreement, and, as I say, the proverbial playing field is in all respects even.

In this regard, we should focus not only on (ii) but on Paragraph A.

As I have noted several times, (ii) forbids the arbitrator from reducing the seniority accrued by any United flight attendant. In other words, the arbitrator could not make a change in the seniority of any United flight attendant which would alter his or her compensation or other financial benefits.

The same subject is dealt with with respect to Pan Am flight attendants in Paragraph A, which provides that "For purposes of compensation, Pan Am flight attendants hired by United Airlines will be given full credit for their flight attendant seniority at Pan Am, adjusted on the same basis as United flight attendants."

Now, what obviously occurred here was the following: United Airlines management had no intention on its own initiative of altering the accrued seniority, that is, the seniority for compensation purposes, of its own employees, the United flight attendants.

When it came to the agreement dealing with the two groups, it was readily agreed—and this was embodied in Paragraph A—that the Pan Am flight attendants would be treated in exactly the same way. They would be given full credit for their flight attendants seniority at Pan Am, adjusted on the same basis as United flight attendants.

So, by virtue of the quite obvious decision of the United Airlines management for its own people and by virute of Paragraph A dealing with the Pan Am people, the two groups were to be dealty with in exactly the same way on the subject of accrued seniority affecting compensation and other financial benefits.

Now, circling back to (ii), it is obvious that there was a potential problem created by the arbitration in that the arbitrator might somehow act in such a way as would affect the compensation rights of the United flight attendants, possibly to reduce them or possibly to increase them.

With the arbitration process going forward, the intention of the United Airlines management—which I have just mentioned and which can be inferred from the evidence—needed to be protected against some possible act by the arbitrator, and, therefore, subpar-

agraph B1(h)(ii) was inserted to protect against this eventuality and to make sure that nothing occurred in the arbitration which changed the compensation rights of the United flight attendants.

Thus, as a result of a decision of the United Airlines management, and as a result of complementary provisions in the arbitration agreement, that is, Paragraph A and Subparagraph B1(h)(ii), the two groups were treated with perfect parity in regard to compensation. That was the obvious intention of Subdivision (ii). Nothing more and nothing less.

Turning to competitive seniority, the arbitrator, as indicated by his lengthy decision, made his determination of the method of integrating on the basis of a variety of relevant and persuasive factors, not hindered or affected in any way by Subdivision (ii).

One of the most powerful factors was that the Pan Am flight attendants who were stationed at the so-called gateways to the Pacific, that is, San Francisco, Los Angeles and Honolulu, were insured that they could stay there.

Despite any seniority differences, the United flight attendants were not eligible, under the agreed arrangements, for bidding against those existing Pan Am flight attendants for those domiciles. There were other factors used by the arbitrator in determining the method of integration, and none of them related to this subdivision (ii).

The court concludes that there is no basis whatever for holding the arbitration agreement void or invalid, in whole or in part, because of any unfair provision. There was simply no unfairness whatever in respect to Subdivision (ii). There was no failure of any duty of fair representation, and there was no breach of fiduciary obligation.

Now, this concludes the findings and conclusions on the points that I am prepared to decide this afternoon.

I am constrained to go further.

This a day and age in which the courts, the Congress and the public are most concerned about wasteful litigation. The issues

which we have spent two days trying should never have been presented.

Plaintiffs had in their hands the deposition of one of their own people, Michael Staudt. It proved them out of court, and surely they knew of what Mr. Staudt would say before he literally said it.

The testimony of plaintiffs' expert, Professor Morris, was of no weight whatever on the points urged by plaintiffs.

The only testimony of weight which Professor Morris gave was when the court pressed him upon the definition of the terms in the arbitration agreement, and at that point his testimony had the effect of the testimony of Mr. Staudt. It simply destroyed any semblance of a case for plaintiffs.

I am speaking strongly, and I do so by design. This is a shocking example of wasteful litigation.

A union and an airline and the court have been subject to an enormous amount of paperwork in an attempt to pursue claims that are wholly irresponsible. I am speaking of the claims I have decided today, and these are the ones which have occupied the bulk of the effort and time in this litigation.

Decision is reserved on the points not covered by today's ruling.

(Adjourned)

Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

No. 91-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ZLATKO GVOZDENOVIC, MARGARITA WALINSKI, PATRICIA CARGOULD, and FRANK PEREA, individually and on behalf of that class of 1202 FORMER PAN AM FLIGHT ATTENDANTS and Former Members of The Independent Union of Flight Attendants Now Employed by United Air Lines, Inc.,

Petitioners,

—v.—

UNITED AIR LINES, INC., STEPHEN WOLF, Its President, THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, SUSAN BIANCI-SAND, Its President, PATRICIA FRIEND, Chairperson of the United Air Lines Master Executive Council, and THE UNITED PREACQUISITION FLIGHT ATTENDANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record for Respondents UNITED AIR LINES, INC. and STEPHEN WOLF, Its President

QUESTIONS RESTATED

1. Did the court of appeals err in holding that petitioners' claim of violation by United and AFA of RLA § 2, Eleventh, by failing to accord the 1202 Pan Am flight attendants hired February 11, 1986 a 60-day grace period to become financial-core members of AFA, was time-barred.

2. Did the court of appeals err in holding that petitioners' claim of violation by United of RLA § 2, Fourth, by making a payment of $132,700 for its arbitration expenses to each of the two flight attendant groups party to the arbitration proceeding over "competitive seniority" on or about March 7, 1987, was time-barred.

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No. 91-334

In the
Supreme Court of the United States

October Term, 1991

ZLATKO GVOZDENOVIC; ET AL.,

Petitioners,

v.

UNITED AIR LINES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is an action by four members of a class consisting of the 1202 former Pan Am flight attendants hired as a group by respondent United Air Lines, Inc. ("United")[1/] on February 11, 1986, as part of United's acquisition of Pan Am's Pacific routes on that date, pursuant to a Letter of Agreement dated December 6, 1985 and ratified March 14, 1986 with respondent Association of Flight Attendants, AFL-CIO ("AFA"), the representative of the craft or class of United's flight attendants for purposes of collective bargaining under the Railway Labor Act. The Letter of Agreement granted a package of favorable terms and conditions of employment to the 1202 former Pan Am flight attendants, including exception from the regular 60-day probationary period for becoming regular employees of United; excepted them as well from the regular 60-day grace period to become dues-paying "financial-core" members of AFA; and provided for arbitration of their "competitive seniority" vis-a-vis that of United's 11,000 pre-acquisition flight attendants.

The burden of the action is to vacate the arbitration award rendered September 26, 1987, in the competitive-seniority arbitration proceeding, on the ground, among others, that the award reflected breach by AFA of its duty of fair representation to the 1202 former Pan Am flight attendants. Neither United nor AFA was a party to or otherwise participated in the arbitration proceeding; the two and only parties to the proceeding were the 1202 former Pan Am flight attendants, by a committee of them selected

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1/ United has a parent company, UAL Corporation. It has no non-wholly-owned subsidiaries.

by their former union and funded by a payment of $132,700 by United, on or about March 7, 1986, into their own arbitration bank account, and the 11,000 pre-acquisition United flight attendants, by a committee of them selected by respondent AFA and funded in the same way. The payments were made pursuant to the same United-AFA agreement ratified March 14, 1986.

The action was commenced December 28, 1987, nearly two years later, against AFA and AFA officers only. As commenced that date, it also complained of the February, 1986 failure to accord the 1202 former Pan Am flight attendants a 60-day grace period, but only as an illegal AFA dues increase under Labor Management Reporting and Disclosure Act ("LMRDA") § 101(a)(3), 29 U.S.C. § 411(a)(3). On July 18, 1988, more than a year and a half after commencement of the action, petitioners added a claim that the February 1986 failure to accord a 60-day grace period also constituted a violation by United and AFA of Railway Labor Act ("RLA") § 2, Eleventh, 45 U.S.C. § 152, Eleventh, which permits carriers and labor organizations to make agreements requiring financial-core union membership after the first 60 days of employment, and that the March 1987 payments to the arbitration accounts of the two flight attendant groups party to the arbitration proceeding constituted a violation by United of RLA § 2, Fourth, 45 U.S.C § 152, Fourth, which bars carriers from using their funds to assist or contribute to any labor organization.

The Court of Appeals first, affirming the District Court, upheld the validity of the arbitration award (Pet. A6-10), adding a finding that the claim of AFA breach of duty of fair representation was time-barred under the 6-month statute of limitations recognized in DelCostello v.

Int'l Bhd. of Teamsters, 462 U.S. 151, 169-71, 103 S.Ct. 2281, 2293-94 (1983)(A9). This brief will not further address this portion of the Court of Appeals' decision, understanding as we do that AFA will be filing a brief giving the reasons for denying the writ as to the award-related issues raised or sought to be raised by the petition.

The Court of Appeals next found, affirming the District Court, that the claims of violation of RLA § 2, Eleventh and 2, Fourth were time-barred because:

> The commencement of the suit on December 27, 1987 was more than six months after both the date on which appellants were required to become AFA members, February 11, 1986, and the date on which the Letter of Agreement was ratified, March 14, 1986. Thus, the six-month period in which appellants were required to protest any unlawful denial of a sixty-day grace period or unlawful financial assistance had lapsed. Cf. DelCostello, 462 U.S. at 172; Robinson v. Pan Am. World Airways, Inc., 777 F.2d 84, 87-89 (2d Cir. 1985).

(A10-A11), going on to reject petitioners' argument to the Court of Appeals, not being made in the petition here, that violations "continued" until the time of the award:

> Likewise, appellants' argument that continued hiring of former Pan Am flight attendants and withdrawals by the Pan Am arbitration committee from the finance account up until the time of the arbitration award bring the claims within the six-month statute of

> limitations is meritless. These claims do not allege "continuing" violations because any "vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered." Local Lodge No. 1424, 362 U.S. at 423.

(Pet. A11). In this regard we note, contrary to impressions sought to be conveyed by petitioners in their petition, (1) that the record shows only one post-February 11, 1986 hiring of a former Pan Am flight attendant during the six months preceding petitioners' making of their RLA § 2, Eleventh claim (on July 18, 1988), that of F. Trevino on March 11, 1988 (R. No. 32, p. 2, para. 6), and, in any event, F. Trevino is not a member of the class for which the District Court certified petitioners as the Rule 23 representative, which is the 1202 former Pan Am flight attendants hired February 11, 1986, and (2) that the record does not show any withdrawal by either flight attendant group party to the arbitration proceeding from its United-funded arbitration bank account during the six months preceding petitioners' making of their RLA § 2, Fourth claim (on July 18, 1988). Thus, nothing happened during the six months prior to petitioners' making of their claims of violation of RLA § 2, Eleventh and 2, Fourth, so far as the record shows, which could have triggered the applicable six-month statute of limitations. Further contrary to impressions sought repeatedly to be conveyed by petitioners throughout their petition, which presents a supposed decision by the Court of Appeals on the merits of the claim of violation of RLA § 2 Eleventh as "[t]he most grievous error of the Court of Appeals' decision" (Pet. 6), the Court

of Appeals did not address or decide the claim of violation of RLA § 2, Eleventh (or of § 2, Fourth) on its merits.

Finally, the Court of Appeals, first rejecting the District Court's finding that the claim of violation of LMRDA § 101(a)(3) was time-barred (A11-A12), decided that claim on the merits, against petitioners, in the following paragraph which petitioners erroneously project throughout their petition as a decision on the merits of the claim of violation of RLA § 2, Eleventh:

> However, even though the section 411(a)(3) claims is not time-barred, we hold that it properly was dismissed. Besides the simple fact that appellants have produced little evidence of any illegal dues assessments or increases, the sixty-day grace period of the United-AFA collective bargaining agreement, upon which they base their "unlawful dues increase" claims, applies only to conventional, newly-hired employees, not to individuals hired laterally as a result of a merger. The section provides that "[n]ewly employed flight attendants" must apply for AFA membership within sixty days of commencing employment, and "shall be admitted to membership in the Union upon expiration of their probationary period as defined in . . . the Agreement." During the probationary period, "the seniority provisions of [the collective bargaining agreement] do not apply to flight attendants unless retained in the service of the Company after the probationary period," and "[t]he service of flight attendants may be terminated at any time during the probationary period

> without a hearing." However, the Letter of Agreement excused the incoming flight attendants from having to undergo a probationary period, and gave them other unique employment benefits because of the circumstances under which they were hired. Thus, it seems clear that the incoming flight attendants were not "newly employed flight attendants" as defined in the collective bargaining agreement and were constrained to pay the AFA dues immediately upon commencing employment.

(A12). We repeat: whatever emanations this paragraph may or may not give as to how the Court of Appeals would have decided the claim of violation of RLA § 2, Eleventh on the merits, if it had decided that claim on the merits, it didn't decide that claim on the merits, and this case does not, therefore, present that question to this Court on this petition. Sup. Ct. R. 15.1.

REASONS FOR DENYING THE WRIT

There is no conflict, as petitioners assert (Pet. Point III pp. 9-11), between the holding of the Court of Appeals that the claim of violation of RLA § 2, Eleventh is time-barred, and decisions of this Court and of "other circuits," and petitioners do not even take the trouble to argue their naked assertion that the holding of the Court of Appeals that the claim of violation of RLA § 2, Fourth is time-barred, presents such a conflict.

I

PETITIONERS SHOW NO CONFLICT WITH THE COURT OF APPEALS' HOLDING THAT THE CLAIM OF VIOLATION BY UNITED AND AFA OF RLA § 2, ELEVENTH IS TIME-BARRED

Petitioners appear to argue, in relation to the claim of violation of RLA § 2, Eleventh, that the decision of the Court of Appeals in this case -- that the six-month statute of limitations for suing on the allegedly violative union-security agreement and its enforcement in this case ran from no later than "the date on which appellants were required to become AFA members, February 11, 1986, and the date on which the Letter of Agreement was ratified, March 14, 1986" (A10), whereas petitioners did not make the claim until 1988 (JA 1204-5) -- conflicts (A) with a Ninth Circuit decision and two Second [sic] Circuits decisions, respectively, "[finding] violations of union security clause provisions to be continuing violations until terminated" (Pet. 9), and (B) with this Court's decision in Felter v. Southern Pacific Co., 359 U.S. 326, 79 S.Ct. 847 (1959), requiring, according to petitioners, that "until such time as a valid agreement and assignment is executed in compliance with

RLA Section 152 Eleventh" (Pet. 10), the statute of limitations for suing on the union-security agreement in this case "is tolled" (Pet. 10).

The cited Ninth and Second Circuit decisions do not conflict with the holding of the Court of Appeals. In NLRB v. Campbell Soup Co., 378 F.2d 259 (9th Cir. 1967), cert. den. 389 U.S. 900, 88 S.Ct. 220 (1967), the Ninth Circuit enforced an NLRB order directing both (1) an employer who had required newly hired employees to join the union immediately, and had deducted union dues and initiation fees from the employees' pay, during their first 30 days of employment, and forwarded them to the union, and (2) the union, jointly and severally,

> "to reimburse all employees hired within six months prior to the time the charge was filed in this case for their first month's dues, and to reimburse those employees who, during the same period, paid initiation fees but worked less than thirty days for the initiation fees so deducted."

(378 F.2d at 260) (emphasis added). This order, if issued in this case, would not require United or AFA to pay a penny, since petitioners and the class they represent were all hired nearly 2-1/2 years prior to petitioners' making of the charge of violation of RLA § 2, Eleventh, and no dues deducted during their first 60 days of employment were deducted during the six months prior to the making of the charge. How Campbell Soup comforts petitioners is a mystery. It is implicit authority for the Court of Appeals decision in the case at bar that petitioners' claim of violation of RLA § 2, Eleventh was time-barred because not made within six

months of the execution/ratification or enforcement of the allegedly violative union-security agreement.

In NLRB v. Sightseeing Guides and Lecturers Union, Local 20076 of Greater N.Y., 310 F.2d 40 (2d Cir. 1962), and NLRB v. Gottfried Baking Co., 210 F.2d 772 (2d Cir. 1954), the Second Circuit enforced NLRB orders directing a union which had caused an employer to discharge (Sightseeing) or to refuse to hire (Gottfried) an employee who refused to join the union during his first 30 days of employment, and (in Gottfried only) the employer, to make the employee whole for any loss of pay suffered, and to cease and desist from maintaining and enforcing a contract clause illegally conditioning employment upon membership in the union. It is true but irrelevant that in both cases the charge was filed more than six months after execution of the agreement containing the illegal union-security clause. The point is that in both cases there were union-security violations -- discriminatory action causing loss of pay by an individual, and maintaining of an illegal clause -- during the six months preceding the filing of the charge. By contrast, there were no violations during the corresponding six-months limitations period in the case at bar. The violations, if they were violations, which United and AFA disputed to the hilt and which the Court of Appeals never decided, had all taken place in 1986, two-plus years before the charges were made in 1988 (JA 1204-5).

Nor does Felter conflict with the decision of the Court of Appeals. Felter was an action, brought by an employee 10 days (359 U.S. at 339, 79 S.Ct. at 856) (dissenting opinion) after his union declined to honor his written revocation of a previous check-off authorization because he had not used the revocation form required by the collective bargaining agreement, to invalidate that

requirement as violative of the proviso of RLA § 2, Eleventh (b):

> "that no such agreement [permitting a carrier and a labor organization to make a dues check-off agreement] shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization . . . which shall be revocable in writing after the expiration of one year"

(emphasis added). This Court held the contractual requirement to be violative of the § 2, Eleventh (b) proviso. Felter presented no statute of limitations question, and no such question was addressed or decided in Felter. Yet petitioners argue that Felter "tolls" the statute of limitations in this case "until such time as a valid agreement and assignment is executed in compliance with RLA Section 152 Eleventh" (Pet. 10). That cannot be, else the statute of limitations would be tolled forever; in any event, no such notion is found in Felter. Felter could fairly be argued to stand for the proposition that, in regard to a union-security provision argued to be invalid on it face, as in the case at bar, the statute of limitations runs not only from the date of execution (or ratification) of the agreement but from its actual enforcement as to a particular individual as well. The Court was so to state in Local Lodge No. 1424, IAM v. NLRB, 362 U.S. 411, 423, 80 S.Ct. 822, 830 (1960). That proposition, of course, would not aid petitioners, since they failed to sue until 1988 (JA 1204-5) over either the execution/ratification in 1986, or the enforcement, also in 1986, of the agreement requiring them and their class to pay AFA dues during their first 60 days of employment which started February 11, 1986.

There is no circuit or other conflict, such as petitioners assert, justifying review.

II

PETITIONERS MAKE NO ARGUMENT FOR REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE CLAIM OF VIOLATION BY UNITED OF RLA § 2, FOURTH IS TIME-BARRED

Petitioners, though they announce in their Question Presented 3 (Pet. i) and in their point heading III (Pet. 9) that they wish to challenge the holding of the Court of Appeals that their claim of violation by United of RLA § 2, Fourth was time-barred, make no argument for the point. Perhaps they forgot. No sensible argument could have been made: petitioners did not make their claim of violation by United of RLA § 2, Fourth until July, 1988 (JA 1205), whereas United had made the payments in question to the two arbitration bank accounts in March, 1987, some 16 months earlier, and had done nothing in the premises during the six months prior to July, 1988.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: September 25, 1991

Respectfully submitted,

Eric Rosenfeld
Attorney for Respondents
UNITED AIR LINES, INC.
and STEPHEN WOLF, Its
President

(3)

No. 91-334

FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ZLATKO GVOZDENOVIC, *et al.*,
Petitioners,

v.

UNITED AIRLINES, INC.,
ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF FLIGHT ATTENDANTS, SUSAN BIANCHI-SAND, PATRICIA FRIEND, AND THE PRE-ACQUISITION UNITED AIRLINES FLIGHT ATTENDANTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly concluded that plaintiffs' claim that the Association of Flight Attendants ("AFA") breached its duty of fair representation by entering into a collective bargaining agreement which provided that an arbitrator would determine plaintiffs' competitive flight attendant seniority at United Airlines, Inc. ("United") was time-barred (in addition to being meritless) where the suit was not filed until nearly two years after the agreement was signed?

2. Whether the court below correctly declined to vacate an arbitration award determining plaintiffs' competitive seniority rights at United when United and AFA were authorized to submit the seniority issue to arbitration and plaintiffs fully participated, without protest, in the extensive and fair arbitration proceedings?

3. Whether the court below properly concluded that plaintiffs' claims that they were subjected to an unlawful "closed shop" and that United unlawfully provided financial assistance to AFA were time-barred where suit was not filed until nearly two years after the alleged wrongs occurred?

LIST OF PARTIES TO THE PROCEEDINGS

United Airlines, Inc., Stephen Wolf,* Association of Flight Attendants, AFL-CIO, Susan Bianchi-Sand, Patricia Friend, and the Pre-Acquisition United Airlines Flight Attendants were defendants in the district court, appellees in the court of appeals, and are respondents in this Court.

Zlatko Gvozdenovic, Margarita Walinski, Patricia Cargould, Frank Perea, individually and on behalf of the class of 1202 former Pan American Flight Attendants now employed by United Airlines, Inc., were plaintiffs in the district court, appellants in the court of appeals, and are petitioners in this Court.

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* Stephen Wolf, not listed as a party in the Petition, was a defendant below and thus is a party to these proceedings. Supreme Court Rule 12.4.

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STATEMENT OF THE CASE

A. In April 1985, United Airlines, Inc. ("United") agreed to purchase the Pacific Division of Pan American World Airways, Inc. ("Pan Am"). App., A.3.[1] As part of the transaction, United agreed to hire 1,202 Pan Am flight attendants (the "1202" or "plaintiffs"). *Id.*

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[1] "App. ——" refers to the appendix annexed to the petition for a writ of certiorari. "Pet. ——" refers to the petition. "J.A. ——" refers to documents in the joint appendix submitted to the court of appeals.

Before any Pan Am flight attendants accepted United job offers, they were informed that, pursuant to a collective bargaining agreement reached between United and the Association of Flight Attendants ("AFA"), the bargaining representative for the United flight attendants, the competitive seniority which the 1202 would have at United would be determined in an arbitration between the 1202 and the incumbent United flight attendants. App., A.4, C.3. The agreement also provided, *inter alia*, that the 1202 would be: credited with their entire service at Pan Am for determining their pay level at United; guaranteed positions at United's west coast international domiciles, even if more senior United flight attendants desired those positions; and relieved from serving the probationary period required of newly employed flight attendants and, as a consequence, be afforded the immediate, full protections of the United-AFA collective bargaining agreement. J.A. 164-66, 276, 632-36, 949, 976-78, 1105-10, 1134, 1342, 1374-75; *see* App., A.12.[2] All Pan Am flight attendants were guaranteed continued employment with Pan Am; none was compelled to join United. App., A.4, C.3.

The 1202 commenced United employment on February 11, 1986. App., A.4. Thereafter, the promised arbitration took place; the 1202 fully participated, without objection, through their chosen committee[3] and counsel, as did the incumbent United flight attendants. App., A.4-5, A.7, C.8. In September 1987, the arbitrator, who had been jointly selected by the two committees, issued a final award (the "Award") integrating the 1202 into the

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[2] The United-AFA Agreement was reached in December, 1985, App., A.4, ratified in January 1986, App., B.3, and formally signed on March 14, 1986. J.A. 636, 960-61.

[3] Contrary to the caption and the list of parties in the Petition, Pet., p. (i), the four named plaintiffs were not members of the Committee which represented the 1202 in the arbitration. *E.g.*, J.A. 197-200.

United seniority list in a manner which the arbitrator considered to be most "equitable." App., A.5; J.A. 274. The basis for the Award was "carefully and thoroughly described" in the arbitrator's lengthy opinion. App., C.5.

B. On December 28, 1987, four of the former Pan Am flight attendants filed suit on behalf of the 1202 against United, AFA and certain officials of each organization. App., A.5. Plaintiffs claimed, *inter alia*, that the Award should be vacated because the 1202 were not parties to the underlying agreement which provided for the arbitration, and that the Award was procured in violation of AFA's duty of fair representation ("DFR"). App., A.5-6. Plaintiffs subsequently asserted that an alleged requirement that the 1202 become AFA members immediately upon employment with United and the denial of plaintiffs' alleged right to full credit for their seniority at Pan Am violated § 2 Eleventh(a) of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Eleventh(a). App., A.5, 10; J.A. 458-69. Without further amending their complaint, plaintiffs additionally, through briefs, alleged that AFA received improper financial assistance from United in violation of § 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, and that AFA improperly raised the dues of the 1202 in violation of § 101(a)(3) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(3). App., A.5-6, 12.

At the conclusion of a bench trial, App. A.6, B.1 (not as plaintiffs assert, on hearing of summary judgment motions, Pet. p. 2), the district court rejected all of plaintiffs' claims related to the issues tried, App., C.1-13, finding, *inter alia*, that plaintiffs, having "consented to" and "active[ly]" participated in the arbitration, were bound by the resulting Award, App., C.8, that the United-AFA Agreement establishing the arbitration treated the two flight attendant groups "with perfect parity," App., C.12, that there "was no failure of any duty of fair representation," *id.*, and that plaintiffs' principal claims were en-

tirely baseless and "a shocking example of wasteful litigation." App., C.13. The trial court subsequently ruled that the RLA and LMRDA statutory claims were time-barred. App., B.4-6.

C. The Second Circuit affirmed the district court rulings in their entirety. Among other things, the appellate court concluded that plaintiffs were bound by the Award because they actively and voluntarily participated in the arbitration without objection and thus by their "conduct manifested a clear intent to arbitrate the dispute," and also because, under established labor law principles, they were bound by the terms of the collectively bargained arbitration agreement upon their becoming part of the United flight attendant collective bargaining unit. App., A.7-8. The court further concluded that AFA did not breach its DFR by agreeing with United to leave the determination of plaintiffs' competitive seniority at United to an arbitrator, and that, in any event, the DFR claim was time-barred because it was not filed within six months after the signing of the challenged arbitration agreement. App., A.8-9. The court of appeals also affirmed the trial court's ruling that plaintiffs' RLA claims were time-barred. App., A.10-11. While the Second Circuit did not find the LMRDA claim untimely, it nevertheless affirmed its dismissal on the merits not only because plaintiffs had failed to demonstrate that AFA illegally increased the dues of the 1202, App., A.12, but also because the 1202 were granted significant "unique employment benefits" which distinguished them from "newly employed flight attendants," App., A.12; *supra*, p. 2, and thus the imposition of dues immediately upon commencement of the employment of the 1202 at United was appropriate under the terms of the United-AFA agreement, upon which plaintiffs' claim was based. App., A.12.

SUMMARY OF ARGUMENT

The decision below involves the routine application of fundamental labor law tenets to undisputed facts, *see* Pet., p.4 (plaintiffs adopt court of appeals' statement of the facts), and is consistent with decisions of this and other appellate courts. The Petition presents no issues warranting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND DOES NOT MERIT SUPREME COURT REVIEW

A. The Petition, on its face, demonstrates that review of the determination below that the DFR claim was time-barred would be purposeless. The Second Circuit rejected the DFR claim not only on limitations grounds but also on the merits. App., A.10; *see* App., C.2-12 (district court also rejected DFR claim on merits).[4] The Petition does *not* seek review of the dismissal on the merits; accordingly, the dismissal of the DFR claim will be unaffected by any further disposition of the limitations issue.

In any event, the limitations ruling was correct. Plaintiffs claimed that AFA breached its DFR by entering into an agreement with United which left the resolution

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[4] The appellate court correctly applied this Court's most recent articulation of the DFR standard, *Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 111 S.Ct. 1127, 1136 (1991), in determining that AFA did not breach any representational duty by entering into an agreement which left the seniority matter to resolution by arbitration between the two affected employee groups. App., A.9-10. *Accord Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990) (where plaintiffs are provided "a *fair* [arbitration] *process* for determining [their] seniority . . . nothing more is required to comply with the duty of fair representation") (emphasis in original), *cert. denied*, 111 S.Ct. 958 (1991).

of the competitive seniority issue to arbitration and which purportedly provided for an arbitration process which favored the incumbent United flight attendants. J.A. 458-69; App., C.7. The lower court, in accordance with established precedent, held that a DFR claim is subject to a six-month statute of limitations, *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 169-71 (1983), and when, as here, it is predicated on an allegedly improper agreement, it accrues when the agreement is reached. App., A.9.[5] Because plaintiffs did not sue until nearly two years after execution of the challenged agreement, the DFR claim was time-barred. Plaintiffs' contention that the limitations period should have been "tolled" while they awaited the arbitrator's ruling, Pet. pp. 11-12, even though their claim was that the arbitration proceeding was defective *ab initio*, would permit plaintiffs to improperly "pin the . . . arbitration proceeding onto their [DFR] case in order to extend the applicable limitations period," *Arriaga-Zayas* v. *ILGWU*, 835 F.2d 11, 15 (1st Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988), and runs directly counter to the need for "rapid final resolution of labor disputes favored by federal law." *DelCostello*, 462 U.S. at 168.[6] None of the

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[5] *Local Lodge 1424, I.A.M.* v. *NLRB*, 362 U.S. 411, 415-19 (1960); *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1262, 1273 (7th Cir. 1985); *Engelhardt* v. *Consolidated Rail Corp.*, 594 F. Supp. 1157, 1172 (N.D.N.Y. 1984), *aff'd*, 756 F.2d 1368 (2d Cir. 1985).

[6] *See also Adkins* v. *International Union of Elec. Workers*, 769 F.2d 330, 335 (6th Cir. 1985) (no tolling of DFR six-month limitation during pendency of National Labor Relations Board proceeding addressing same conduct challenged in DFR action); *Boyd* v. *Teamsters Local Union 553*, 589 F. Supp. 794, 796 (S.D.N.Y. 1984) (same); *cf. Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976) (no tolling of Title VII statute of limitations while plaintiff pursues relief through grievance proceedings for same alleged wrongdoing); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460-66 (1975) (time for filing claim under 28 U.S.C. § 1981 not tolled by pursuit of administrative remedy directed at same conduct).

cases on which plaintiffs rely (Pet., pp. 11-12) supports "tolling" the statute of limitations here.[7]

B. Plaintiffs' contention that they are not bound by the Award or the underlying arbitration agreement because they were not employees of United when the agreement was reached, Pet., pp. 12-13, is at odds with basic principles of federal labor law. As the Second Circuit correctly held, App., A.7, a collective bargaining agreement, including one providing for arbitration, applies not only to employees in the bargaining unit when the agreement is reached, but also to those who join the bargaining unit during the agreement's duration; an employer and union need not renegotiate or reaffirm their agreement each time a new employee is hired in order to bind the individual to the agreement's terms.[8] *Sanders* v. *Air Line Pilots Ass'n, Int'l*, 361 F.Supp. 670, 672-73 (S.D.N.Y. 1973), Pet., pp. 12-13, merely confirms the uncontestable tenet that employees of the surviving company in a merger (in our case, the incumbent United flight at-

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[7] *West* v. *Conrail*, 481 U.S. 35, 36 (1987), confirms that a DFR action begins to run when plaintiffs learn of the union's alleged breach. *Robinson* v. *Pan Am World Airways, Inc.*, 777 F.2d 84, 89 (2d Cir. 1985), discusses the applicability of equitable tolling in a situation, indisputably absent here, where defendants have actively misled plaintiffs as to the facts giving rise to their cause of action. No arbitration proceeding or award was involved in *Hogan* v. *Brotherhood of Ry. Clerks*, 817 F.2d 248, 250 (4th Cir. 1987), and nothing in *DelCostello*, 462 U.S. at 172, holds that the limitation period of a DFR claim that is founded, as here, on the terms of a collective bargaining agreement, is tolled until issuance of an arbitration award.

[8] *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 335-36 (1944); *NLRB* v. *Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966); *Wood* v. *National Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987); *Powell* v. *National Football League*, 711 F. Supp. 959, 962-63 (D. Minn. 1989); *Zimmerman* v. *National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986); R. Gorman, Labor Law 377 (1976). Different principles apply when dealing with commercial arbitrations, App.,

A.7, as in the cases cited at Pet., p. 12.

tendants) are not bound by the collective bargaining agreement between the acquired company and its employees' union (here, the agreement between Pan Am and the bargaining representative of the Pan Am flight attendants). Further, both *Sanders*, 361 F.Supp. at 673, 677, and *Cook* v. *Pan Am World Airways, Inc.*, 771 F.2d 635, 645-46 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986), Pet., p. 13, reflecting established law, including the ruling below, App., A.7, hold that, where, as here, plaintiffs' interests have been represented in an arbitration proceeding, they are bound by the ensuing award.[9]

C. Plaintiffs' request for review of the dismissal of their RLA Section 2 Eleventh(a) claim rests on a misconstruction of the ruling below and a misreading of the applicable law.

First, contra Pet., pp. 5-6, the Second Circuit only determined that the RLA claim was time-barred, App. A.10-11; it did not purport to address the scope of the statutory provision.

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[9] *E.g., Teamsters Local 764* v. *J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985); *Jones Dairy Farm* v. *Local P-1236, UFCW*, 760 F.2d 173, 175 (7th Cir.), *cert. denied*, 474 U.S. 845 (1985); *International Bhd. of Teamsters, Local 117* v. *Washington Employees, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977).

Beardsley v. *Chicago & N.W. Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), and *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974), Pet., pp. 13-14, sharply contrast with the situation here in which the United-AFA Agreement left the seniority issues to determination through an arbitration in which plaintiffs were full and equal participants. In *Beardsley*, the agreement (to which the arbitrator improperly deferred) determined plaintiffs' *substantive* seniority rights (placing them at the bottom of the seniority list), and was negotiated by local union officers in violation of both the requirements imposed by the governing collective bargaining agreement negotiated by the local's parent international union and the international's construction of its constitution. 850 F.2d at 1259, 1261-63, 1268-71. In *Jones*, the union negotiated an agreement which placed a group of employees who were already in the bargaining unit at the bottom of the seniority list solely because they were not union members. 495 F.2d at 797-98.

Second, the appellate court's rejection of plaintiffs' "continuing" violation theory, App., A.11, is in accord with decisions of this Court and other appellate courts. Because the alleged improper requirement that plaintiffs join AFA upon employment at United was embodied in the United-AFA agreement, *see* Pet., p. 11 (plaintiffs' compulsory union membership claim "inextricably bound up" with agreement), it accrued at the latest when the agreement was signed (March 14, 1986), and is time-barred. App., A.11; *Local Lodge 1424*, 362 U.S. at 423; *Hogan*, 817 F.2d at 250 (six-month limitation applicable to RLA § 2 Eleventh claim); *supra*, p. 6 & n.5. Further, even assuming *arguendo* that plaintiffs were entitled to a 60 day "grace period" under Section 2 Eleventh before AFA membership could be required, membership indisputedly could have been required, and thus any alleged violation would have ceased, 60 days after the employment of the 1202 commenced, *i.e.*, by April 12, 1986. *Hogan*, 817 F.2d at 250 (claim of improper compulsion to join union accrues when alleged unlawful coercion ends). The refusal of the lower court to permit plaintiffs to sidestep the limitations bar by characterizing their claim as "continuing," App. A.11, or by relying on alleged timely claims of a handful of subsequently hired former Pan Am flight attendants who were not class members, *see* App., B.5, conforms with decisions of this Court and the lower courts in the Title VII context,[10] as

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[10] *Lorance* v. *AT&T*, 490 U.S. 900, 906-08 (1989) (limitation period commenced when alleged discrimination occurred); *Delaware State College* v. *Ricks*, 449 U.S. 250, 257-59 (1980) (same); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-60 (1977) (same). *See Movement For Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980) (timely claims of certain class members cannot revive time-barred claims of others); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 246 (3d Cir.) (same), *cert. denied*, 421 U.S. 1011 (1975); *Selzer* v. *Board of Ed.*, 113 F.R.D. 165, 168 (S.D.N.Y. 1986) (same); *Carter* v. *Newsday, Inc.*, 76 F.R.D. 9, 15 (E.D.N.Y. 1976) (same); *Hecht* v. *Cooperative for Am. Relief Everywhere, Inc.*, 351 F. Supp. 305, 310 (S.D.N.Y. 1972) (same).

well as other lower court labor law decisions.[11] The authorities cited by plaintiffs, Pet. pp. 9-10, are either consistent with the ruling below, *NLRB* v. *Campbell Soup Co.*, 378 F.2d 259 (9th Cir.), *cert. denied*, 389 U.S. 900 (1967),[12] or inapposite.[13]

D. Plaintiffs also provide no basis for review of the Second Circuit's refusal to treat plaintiffs' claim under § 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, as "con-

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[11] *United Indep. Flight Officers*, 756 F.2d at 1273 & n.14 (rejecting assertion of continuing violation and determining that claim accrued when alleged wrong occurred); *Engelhardt*, 594 F. Supp. at 1171-72 (same); *Bedat* v. *McLean Trucking Co.*, 119 L.R.R.M. (BNA) 2945, 2946-47 (D. Conn.) (same), *aff'd without opinion*, 794 F.2d 676 (2d Cir. 1984); *Adkins* v. *General Motors Corp.*, 573 F. Supp. 1188, 1193 (S.D. Oh. 1983) (same), *aff'd*, 769 F.2d 330 (6th Cir. 1985).

[12] In *Campbell*, the reimbursement of one month's dues for violation of a 30 day "grace period" provided under the National Labor Relations Act was available only to those "employees hired within six months prior to the time the charge was filed . . . ." 378 F.2d at 260-61.

[13] *Felter* v. *Southern Pac. Co.*, 359 U.S. 326, 331 (1959), provided simply that an individual cannot be subjected to a union dues checkoff (of which, *contra*, Pet., p. 10, there is none at issue in the instant case) until the employee executes a checkoff assignment, and, *contra*, Pet., p. 10, makes no mention of a "six month" period or its "tolling" or "waiver." Neither does *Communication Workers* v. *Beck*, 487 U.S. 735 (1988), which, like *Ellis* v. *Western Airlines*, 652 F. Supp. 938 (S.D. Cal. 1986), concerned issues related to the chargeability of union expenditures to objecting non-members which have nothing to do with this case. *NLRB* v. *Sightseeing Guides Union Local 20076*, 310 F.2d 40, 41 (2d Cir. 1962), and *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 780 (2d Cir. 1954), involved illegal closed-shop agreements which, unlike here, continued to favor the hiring of union members over non-union members within six months of the filing of NLRB charges. Further, even where a closed-shop agreement exists, no dues reimbursement is required where, as here, there is no evidence that union membership was compelled. *Local 60, United Bhd. of Carpenters* v. *NLRB*, 365 U.S. 651, 654 (1961). *See* App., B. 3 (15% of plaintiffs' class elected not to become AFA members).

tinuing" beyond the limitations period. The § 2 Fourth claim was based on United's provision of equal funding to the committees representing the two flight attendant groups for activities related to the arbitration. App., A. 4; *see also* J.A. 639, 1480-81 (funding not provided to AFA).[14] Because all payments were made in March 1986, *id.*, plaintiffs' failure to sue within six months thereafter was fatal, as the court below properly held. App., A. 10-11. *Accord Robinson*, 777 F.2d at 87-89 (six-month limitation applicable to RLA § 2 Fourth claim); *see* cases cited *supra*, pp. 9-10 & nn.10, 11 (claim does not continue once alleged violation ended).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[14] The funding arrangements which AFA secured benefitted plaintiffs by eliminating the significant financial advantage which the incumbent United flight attendants, who outnumbered the 1202 by 9 to 1, would have enjoyed had the two groups been required to underwrite their own arbitration-related legal fees and costs through an assessment of their respective flight attendant constituents. J.A. 491 ¶ H, 639, 1480-82.

FILED
SEP 24 1991
OFFICE OF THE CLERK

No. 91-334

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ZLATKO GVOZDENOVIC, *et al.*,
Petitioners,
v.
UNITED AIRLINES, INC.,
ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF FLIGHT ATTENDANTS, SUSAN BIANCHI-SAND, PATRICIA FRIEND, AND THE PRE-ACQUISITION UNITED AIRLINES FLIGHT ATTENDANTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly concluded that plaintiffs' claim that the Association of Flight Attendants ("AFA") breached its duty of fair representation by entering into a collective bargaining agreement which provided that an arbitrator would determine plaintiffs' competitive flight attendant seniority at United Airlines, Inc. ("United") was time-barred (in addition to being meritless) where the suit was not filed until nearly two years after the agreement was signed?

2. Whether the court below correctly declined to vacate an arbitration award determining plaintiffs' competitive seniority rights at United when United and AFA were authorized to submit the seniority issue to arbitration and plaintiffs fully participated, without protest, in the extensive and fair arbitration proceedings?

3. Whether the court below properly concluded that plaintiffs' claims that they were subjected to an unlawful "closed shop" and that United unlawfully provided financial assistance to AFA were time-barred where suit was not filed until nearly two years after the alleged wrongs occurred?

LIST OF PARTIES TO THE PROCEEDINGS

United Airlines, Inc., Stephen Wolf,* Association of Flight Attendants, AFL-CIO, Susan Bianchi-Sand, Patricia Friend, and the Pre-Acquisition United Airlines Flight Attendants were defendants in the district court, appellees in the court of appeals, and are respondents in this Court.

Zlatko Gvozdenovic, Margarita Walinski, Patricia Cargould, Frank Perea, individually and on behalf of the class of 1202 former Pan American Flight Attendants now employed by United Airlines, Inc., were plaintiffs in the district court, appellants in the court of appeals, and are petitioners in this Court.

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* Stephen Wolf, not listed as a party in the Petition, was a defendant below and thus is a party to these proceedings. Supreme Court Rule 12.4.

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OCTOBER TERM, 1991

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Petitioners,

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STATEMENT OF THE CASE

A. In April 1985, United Airlines, Inc. ("United") agreed to purchase the Pacific Division of Pan American World Airways, Inc. ("Pan Am"). App., A.3.[1] As part of the transaction, United agreed to hire 1,202 Pan Am flight attendants (the "1202" or "plaintiffs"). *Id.*

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[1] "App. ——" refers to the appendix annexed to the petition for a writ of certiorari. "Pet. ——" refers to the petition. "J.A. ——" refers to documents in the joint appendix submitted to the court of appeals.

Before any Pan Am flight attendants accepted United job offers, they were informed that, pursuant to a collective bargaining agreement reached between United and the Association of Flight Attendants ("AFA"), the bargaining representative for the United flight attendants, the competitive seniority which the 1202 would have at United would be determined in an arbitration between the 1202 and the incumbent United flight attendants. App., A.4, C.3. The agreement also provided, *inter alia*, that the 1202 would be: credited with their entire service at Pan Am for determining their pay level at United; guaranteed positions at United's west coast international domiciles, even if more senior United flight attendants desired those positions; and relieved from serving the probationary period required of newly employed flight attendants and, as a consequence, be afforded the immediate, full protections of the United-AFA collective bargaining agreement. J.A. 164-66, 276, 632-36, 949, 976-78, 1105-10, 1134, 1342, 1374-75; *see* App., A.12.[2] All Pan Am flight attendants were guaranteed continued employment with Pan Am; none was compelled to join United. App., A.4, C.3.

The 1202 commenced United employment on February 11, 1986. App., A.4. Thereafter, the promised arbitration took place; the 1202 fully participated, without objection, through their chosen committee [3] and counsel, as did the incumbent United flight attendants. App., A.4-5, A.7, C.8. In September 1987, the arbitrator, who had been jointly selected by the two committees, issued a final award (the "Award") integrating the 1202 into the

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[2] The United-AFA Agreement was reached in December, 1985, App., A.4, ratified in January 1986, App., B.3, and formally signed on March 14, 1986. J.A. 636, 960-61.

[3] Contrary to the caption and the list of parties in the Petition, Pet., p. (i), the four named plaintiffs were not members of the Committee which represented the 1202 in the arbitration. *E.g.*, J.A. 197-200.

United seniority list in a manner which the arbitrator considered to be most "equitable." App., A.5; J.A. 274. The basis for the Award was "carefully and thoroughly described" in the arbitrator's lengthy opinion. App., C.5.

B. On December 28, 1987, four of the former Pan Am flight attendants filed suit on behalf of the 1202 against United, AFA and certain officials of each organization. App., A.5. Plaintiffs claimed, *inter alia*, that the Award should be vacated because the 1202 were not parties to the underlying agreement which provided for the arbitration, and that the Award was procured in violation of AFA's duty of fair representation ("DFR"). App., A.5-6. Plaintiffs subsequently asserted that an alleged requirement that the 1202 become AFA members immediately upon employment with United and the denial of plaintiffs' alleged right to full credit for their seniority at Pan Am violated § 2 Eleventh(a) of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Eleventh(a). App., A.5, 10; J.A. 458-69. Without further amending their complaint, plaintiffs additionally, through briefs, alleged that AFA received improper financial assistance from United in violation of § 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, and that AFA improperly raised the dues of the 1202 in violation of § 101(a)(3) of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(3). App., A.5-6, 12.

At the conclusion of a bench trial, App. A.6, B.1 (not as plaintiffs assert, on hearing of summary judgment motions, Pet. p. 2), the district court rejected all of plaintiffs' claims related to the issues tried, App., C.1-13, finding, *inter alia*, that plaintiffs, having "consented to" and "active[ly]" participated in the arbitration, were bound by the resulting Award, App., C.8, that the United-AFA Agreement establishing the arbitration treated the two flight attendant groups "with perfect parity," App., C.12, that there "was no failure of any duty of fair representation," *id.*, and that plaintiffs' principal claims were en-

tirely baseless and "a shocking example of wasteful litigation." App., C.13. The trial court subsequently ruled that the RLA and LMRDA statutory claims were time-barred. App., B.4-6.

C. The Second Circuit affirmed the district court rulings in their entirety. Among other things, the appellate court concluded that plaintiffs were bound by the Award because they actively and voluntarily participated in the arbitration without objection and thus by their "conduct manifested a clear intent to arbitrate the dispute," and also because, under established labor law principles, they were bound by the terms of the collectively bargained arbitration agreement upon their becoming part of the United flight attendant collective bargaining unit. App., A.7-8. The court further concluded that AFA did not breach its DFR by agreeing with United to leave the determination of plaintiffs' competitive seniority at United to an arbitrator, and that, in any event, the DFR claim was time-barred because it was not filed within six months after the signing of the challenged arbitration agreement. App., A.8-9. The court of appeals also affirmed the trial court's ruling that plaintiffs' RLA claims were time-barred. App., A.10-11. While the Second Circuit did not find the LMRDA claim untimely, it nevertheless affirmed its dismissal on the merits not only because plaintiffs had failed to demonstrate that AFA illegally increased the dues of the 1202, App., A.12, but also because the 1202 were granted significant "unique employment benefits" which distinguished them from "newly employed flight attendants," App., A.12; *supra*, p. 2, and thus the imposition of dues immediately upon commencement of the employment of the 1202 at United was appropriate under the terms of the United-AFA agreement, upon which plaintiffs' claim was based. App., A.12.

SUMMARY OF ARGUMENT

The decision below involves the routine application of fundamental labor law tenets to undisputed facts, *see* Pet., p.4 (plaintiffs adopt court of appeals' statement of the facts), and is consistent with decisions of this and other appellate courts. The Petition presents no issues warranting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND DOES NOT MERIT SUPREME COURT REVIEW

A. The Petition, on its face, demonstrates that review of the determination below that the DFR claim was time-barred would be purposeless. The Second Circuit rejected the DFR claim not only on limitations grounds but also on the merits. App., A.10; *see* App., C.2-12 (district court also rejected DFR claim on merits).[4] The Petition does *not* seek review of the dismissal on the merits; accordingly, the dismissal of the DFR claim will be unaffected by any further disposition of the limitations issue.

In any event, the limitations ruling was correct. Plaintiffs claimed that AFA breached its DFR by entering into an agreement with United which left the resolution

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[4] The appellate court correctly applied this Court's most recent articulation of the DFR standard, *Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 111 S.Ct. 1127, 1136 (1991), in determining that AFA did not breach any representational duty by entering into an agreement which left the seniority matter to resolution by arbitration between the two affected employee groups. App., A.9-10. *Accord Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990) (where plaintiffs are provided "a *fair* [arbitration] *process* for determining [their] seniority . . . nothing more is required to comply with the duty of fair representation") (emphasis in original), *cert. denied*, 111 S.Ct. 958 (1991).

of the competitive seniority issue to arbitration and which purportedly provided for an arbitration process which favored the incumbent United flight attendants. J.A. 458-69; App., C.7. The lower court, in accordance with established precedent, held that a DFR claim is subject to a six-month statute of limitations, *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 169-71 (1983), and when, as here, it is predicated on an allegedly improper agreement, it accrues when the agreement is reached. App., A.9.[5] Because plaintiffs did not sue until nearly two years after execution of the challenged agreement, the DFR claim was time-barred. Plaintiffs' contention that the limitations period should have been "tolled" while they awaited the arbitrator's ruling, Pet. pp. 11-12, even though their claim was that the arbitration proceeding was defective *ab initio*, would permit plaintiffs to improperly "pin the . . . arbitration proceeding onto their [DFR] case in order to extend the applicable limitations period," *Arriaga-Zayas* v. *ILGWU*, 835 F.2d 11, 15 (1st Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988), and runs directly counter to the need for "rapid final resolution of labor disputes favored by federal law." *DelCostello*, 462 U.S. at 168.[6] None of the

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[5] *Local Lodge 1424, I.A.M.* v. *NLRB*, 362 U.S. 411, 415-19 (1960); *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1262, 1273 (7th Cir. 1985); *Engelhardt* v. *Consolidated Rail Corp.*, 594 F. Supp. 1157, 1172 (N.D.N.Y. 1984), *aff'd*, 756 F.2d 1368 (2d Cir. 1985).

[6] *See also Adkins* v. *International Union of Elec. Workers*, 769 F.2d 330, 335 (6th Cir. 1985) (no tolling of DFR six-month limitation during pendency of National Labor Relations Board proceeding addressing same conduct challenged in DFR action); *Boyd* v. *Teamsters Local Union 553*, 589 F. Supp. 794, 796 (S.D.N.Y. 1984) (same); *cf. Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976) (no tolling of Title VII statute of limitations while plaintiff pursues relief through grievance proceedings for same alleged wrongdoing); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460-66 (1975) (time for filing claim under 28 U.S.C. § 1981 not tolled by pursuit of administrative remedy directed at same conduct).

cases on which plaintiffs rely (Pet., pp. 11-12) supports "tolling" the statute of limitations here.[7]

B. Plaintiffs' contention that they are not bound by the Award or the underlying arbitration agreement because they were not employees of United when the agreement was reached, Pet., pp. 12-13, is at odds with basic principles of federal labor law. As the Second Circuit correctly held, App., A.7, a collective bargaining agreement, including one providing for arbitration, applies not only to employees in the bargaining unit when the agreement is reached, but also to those who join the bargaining unit during the agreement's duration; an employer and union need not renegotiate or reaffirm their agreement each time a new employee is hired in order to bind the individual to the agreement's terms.[8] *Sanders* v. *Air Line Pilots Ass'n, Int'l*, 361 F.Supp. 670, 672-73 (S.D.N.Y. 1973), Pet., pp. 12-13, merely confirms the uncontestable tenet that employees of the surviving company in a merger (in our case, the incumbent United flight at-

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[7] *West* v. *Conrail*, 481 U.S. 35, 36 (1987), confirms that a DFR action begins to run when plaintiffs learn of the union's alleged breach. *Robinson* v. *Pan Am World Airways, Inc.*, 777 F.2d 84, 89 (2d Cir. 1985), discusses the applicability of equitable tolling in a situation, indisputably absent here, where defendants have actively misled plaintiffs as to the facts giving rise to their cause of action. No arbitration proceeding or award was involved in *Hogan* v. *Brotherhood of Ry. Clerks*, 817 F.2d 248, 250 (4th Cir. 1987), and nothing in *DelCostello*, 462 U.S. at 172, holds that the limitation period of a DFR claim that is founded, as here, on the terms of a collective bargaining agreement, is tolled until issuance of an arbitration award.

[8] *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 335-36 (1944); *NLRB* v. *Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966); *Wood* v. *National Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987); *Powell* v. *National Football League*, 711 F. Supp. 959, 962-63 (D. Minn. 1989); *Zimmerman* v. *National Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986); R. Gorman, Labor Law 377 (1976). Different principles apply when dealing with commercial arbitrations, App., A.7, as in the cases cited at Pet., p. 12.

tendants) are not bound by the collective bargaining agreement between the acquired company and its employees' union (here, the agreement between Pan Am and the bargaining representative of the Pan Am flight attendants). Further, both *Sanders*, 361 F.Supp. at 673, 677, and *Cook* v. *Pan Am World Airways, Inc.*, 771 F.2d 635, 645-46 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986), Pet., p. 13, reflecting established law, including the ruling below, App., A.7, hold that, where, as here, plaintiffs' interests have been represented in an arbitration proceeding, they are bound by the ensuing award.[9]

C. Plaintiffs' request for review of the dismissal of their RLA Section 2 Eleventh(a) claim rests on a misconstruction of the ruling below and a misreading of the applicable law.

First, contra Pet., pp. 5-6, the Second Circuit only determined that the RLA claim was time-barred, App. A.10-11; it did not purport to address the scope of the statutory provision.

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[9] *E.g., Teamsters Local 764* v. *J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985); *Jones Dairy Farm* v. *Local P-1236, UFCW*, 760 F.2d 173, 175 (7th Cir.), *cert. denied*, 474 U.S. 845 (1985); *International Bhd. of Teamsters, Local 117* v. *Washington Employees, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977).

Beardsley v. *Chicago & N.W. Transp. Co.*, 850 F.2d 1255 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), and *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974), Pet., pp. 13-14, sharply contrast with the situation here in which the United-AFA Agreement left the seniority issues to determination through an arbitration in which plaintiffs were full and equal participants. In *Beardsley*, the agreement (to which the arbitrator improperly deferred) determined plaintiffs' *substantive* seniority rights (placing them at the bottom of the seniority list), and was negotiated by local union officers in violation of both the requirements imposed by the governing collective bargaining agreement negotiated by the local's parent international union and the international's construction of its constitution. 850 F.2d at 1259, 1261-63, 1268-71. In *Jones*, the union negotiated an agreement which placed a group of employees who were already in the bargaining unit at the bottom of the seniority list solely because they were not union members. 495 F.2d at 797-98.

Second, the appellate court's rejection of plaintiffs' "continuing" violation theory, App., A.11, is in accord with decisions of this Court and other appellate courts. Because the alleged improper requirement that plaintiffs join AFA upon employment at United was embodied in the United-AFA agreement, *see* Pet., p. 11 (plaintiffs' compulsory union membership claim "inextricably bound up" with agreement), it accrued at the latest when the agreement was signed (March 14, 1986), and is time-barred. App., A.11; *Local Lodge 1424*, 362 U.S. at 423; *Hogan*, 817 F.2d at 250 (six-month limitation applicable to RLA § 2 Eleventh claim); *supra*, p. 6 & n.5. Further, even assuming *arguendo* that plaintiffs were entitled to a 60 day "grace period" under Section 2 Eleventh before AFA membership could be required, membership indisputedly could have been required, and thus any alleged violation would have ceased, 60 days after the employment of the 1202 commenced, *i.e.*, by April 12, 1986. *Hogan*, 817 F.2d at 250 (claim of improper compulsion to join union accrues when alleged unlawful coercion ends). The refusal of the lower court to permit plaintiffs to sidestep the limitations bar by characterizing their claim as "continuing," App. A.11, or by relying on alleged timely claims of a handful of subsequently hired former Pan Am flight attendants who were not class members, *see* App., B.5, conforms with decisions of this Court and the lower courts in the Title VII context,[10] as

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[10] *Lorance* v. *AT&T*, 490 U.S. 900, 906-08 (1989) (limitation period commenced when alleged discrimination occurred); *Delaware State College* v. *Ricks*, 449 U.S. 250, 257-59 (1980) (same); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-60 (1977) (same). *See Movement For Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235, 1248 (7th Cir. 1980) (timely claims of certain class members cannot revive time-barred claims of others); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 246 (3d Cir.) (same), *cert. denied*, 421 U.S. 1011 (1975); *Selzer* v. *Board of Ed.*, 113 F.R.D. 165, 168 (S.D.N.Y. 1986) (same); *Carter* v. *Newsday, Inc.*, 76 F.R.D. 9, 15 (E.D.N.Y. 1976) (same); *Hecht* v. *Cooperative for Am. Relief Everywhere, Inc.*, 351 F. Supp. 305, 310 (S.D.N.Y. 1972) (same).

well as other lower court labor law decisions.[11] The authorities cited by plaintiffs, Pet. pp. 9-10, are either consistent with the ruling below, *NLRB* v. *Campbell Soup Co.*, 378 F.2d 259 (9th Cir.), *cert. denied*, 389 U.S. 900 (1967),[12] or inapposite.[13]

D. Plaintiffs also provide no basis for review of the Second Circuit's refusal to treat plaintiffs' claim under § 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, as "con-

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[11] *United Indep. Flight Officers*, 756 F.2d at 1273 & n.14 (rejecting assertion of continuing violation and determining that claim accrued when alleged wrong occurred); *Engelhardt*, 594 F. Supp. at 1171-72 (same); *Bedat* v. *McLean Trucking Co.*, 119 L.R.R.M. (BNA) 2945, 2946-47 (D. Conn.) (same), *aff'd without opinion*, 794 F.2d 676 (2d Cir. 1984); *Adkins* v. *General Motors Corp.*, 573 F. Supp. 1188, 1193 (S.D. Oh. 1983) (same), *aff'd*, 769 F.2d 330 (6th Cir. 1985).

[12] In *Campbell*, the reimbursement of one month's dues for violation of a 30 day "grace period" provided under the National Labor Relations Act was available only to those "employees hired within six months prior to the time the charge was filed . . . ." 378 F.2d at 260-61.

[13] *Felter* v. *Southern Pac. Co.*, 359 U.S. 326, 331 (1959), provided simply that an individual cannot be subjected to a union dues checkoff (of which, *contra*, Pet., p. 10, there is none at issue in the instant case) until the employee executes a checkoff assignment, and, *contra*, Pet., p. 10, makes no mention of a "six month" period or its "tolling" or "waiver." Neither does *Communication Workers* v. *Beck*, 487 U.S. 735 (1988), which, like *Ellis* v. *Western Airlines*, 652 F. Supp. 938 (S.D. Cal. 1986), concerned issues related to the chargeability of union expenditures to objecting non-members which have nothing to do with this case. *NLRB* v. *Sightseeing Guides Union Local 20076*, 310 F.2d 40, 41 (2d Cir. 1962), and *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 780 (2d Cir. 1954), involved illegal closed-shop agreements which, unlike here, continued to favor the hiring of union members over non-union members within six months of the filing of NLRB charges. Further, even where a closed-shop agreement exists, no dues reimbursement is required where, as here, there is no evidence that union membership was compelled. *Local 60, United Bhd. of Carpenters* v. *NLRB*, 365 U.S. 651, 654 (1961). *See* App., B. 3 (15% of plaintiffs' class elected not to become AFA members).

tinuing" beyond the limitations period. The § 2 Fourth claim was based on United's provision of equal funding to the committees representing the two flight attendant groups for activities related to the arbitration. App., A. 4; *see also* J.A. 639, 1480-81 (funding not provided to AFA).[14] Because all payments were made in March 1986, *id.*, plaintiffs' failure to sue within six months thereafter was fatal, as the court below properly held. App., A. 10-11. *Accord Robinson*, 777 F.2d at 87-89 (six-month limitation applicable to RLA § 2 Fourth claim); *see* cases cited *supra*, pp. 9-10 & nn.10, 11 (claim does not continue once alleged violation ended).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[14] The funding arrangements which AFA secured benefitted plaintiffs by eliminating the significant financial advantage which the incumbent United flight attendants, who outnumbered the 1202 by 9 to 1, would have enjoyed had the two groups been required to underwrite their own arbitration-related legal fees and costs through an assessment of their respective flight attendant constituents. J.A. 491 ¶ H, 639, 1480-82.